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No. 15000

United States
Court of Appeals
for the Ninth Circuit

CEDRIC THEODORE BERG and VICTORIA
RUTH FOUGHTY HELLER,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Western District of Washington
Northern Division

FILED

OCT 2 1956

PAUL P. O'BRIEN, CLERK

No. 15000

United States
Court of Appeals
for the Ninth Circuit

CEDRIC THEODORE BERG and VICTORIA
RUTH FOUGHTY HELLER,
Appellants,

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1365 148th Avenue,
San Leandro, California,

Appellant.

MAX KOSHER,

2919 Wetmore Avenue,
Everett, Washington,

Attorney for Appellant

Victoria Ruth Foughty Heller.

CHARLES P. MORIARTY and
MURRAY B. GUTERSON,

1012 U. S. Court House,
Seattle 4, Washington,

Attorneys for Appellee.

In the United States District Court, Western District of Washington, Northern Division

No. 49239

UNITED STATES OF AMERICA,
Plaintiff,
vs.

CEDRIC THEODORE BERG and VICTORIA
RUTH FOUGHTY HELLER,
Defendants.

INDICTMENT

The Grand Jury charges:

Count I.

That on or about April 13, 1955, Cedric Theodore Berg and Victoria Ruth Foughty Heller did knowingly, wilfully and unlawfully persuade, induce and entice Rose Drucilla West, a female person, to go from San Francisco, California, to the Northern Division of the Western District of Washington, with the intent that the said Rose Drucilla West should engage in the practice of prostitution, debauchery, and for other immoral purposes, and did thereby knowingly cause the said Rose Drucilla West to go and be transported as a passenger upon the line and route of a common carrier in interstate commerce.

All in violation of Section 2422, Title 18, U.S.C.
A true bill.

/s/ JOHN STEEN,
Foreman.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JOHN A. ROBERTS, JR.,
Assistant United States Attorney.

Presented to the Court by the foreman of the
Grand Jury in open Court, in the presence of the
Grand Jury and filed in the U. S. District Court
at Seattle, Washington, June 22, 1955. Millard P.
Thomas, Clerk. By Lee L. Bruff, Deputy.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the
Defendant Cedric Theodore Berg is guilty as
charged in the Indictment; and further find the
Defendant Victoria Ruth Foughty Heller is guilty
as charged in the Indictment.

Dated: September 30, 1955.

/s/ ANTONIO ROBERTO,
Foreman.

[Endorsed]: Filed September 30, 1955.

[Title of District Court and Cause.]

**MOTION FOR A JUDGMENT OF ACQUITTAL
NOTWITHSTANDING THE VERDICT, OR
IN THE ALTERNATIVE A MOTION FOR
NEW TRIAL**

Comes now the defendant, Victoria Ruth Foughty Heller, through her attorney, Max Kosher, and moves this honorable court for a judgment of acquittal notwithstanding the verdict, upon the grounds that the evidence introduced at the trial herein was not sufficient to sustain a verdict of guilty against the defendant, Victoria Ruth Foughty Heller.

That in event a Motion for Judgment of Acquittal is denied, and in that event, the defendant, Victoria Ruth Foughty Heller, through her attorney, Max Kosher, hereby moves this honorable court for an order granting a new trial to the said defendant on the following grounds:

- (1) That the verdict rendered herein was contrary to the interests of justice;
- (2) For error of law occurring at trial and excepted to by said defendant; and
- (3) That the verdict is contrary to law and evidence.

/s/ MAX KOSHER,

Attorney for Defendant, Victoria Ruth Foughty Heller.

Acknowledgment of Service attached.

[Endorsed]: Filed October 3, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL
NOTWITHSTANDING THE VERDICT, OR
IN THE ALTERNATIVE MOTION FOR
NEW TRIAL

Comes now the defendant Cedric Theodore Berg, by and through his undersigned attorney, Sidney C. Volinn, and moves this honorable court for a judgment of acquittal notwithstanding the verdict, upon the grounds that the evidence introduced at the trial herein was insufficient to sustain a verdict of guilty against said defendant.

That in the event such a motion for acquittal is denied, and in that event, defendant further moves for an order granting a new trial to said defendant on the following grounds:

(1) That the verdict rendered herein was contrary to the interests of justice;

(2) For error of law occurring during the trial and excepted to by the defendant;

(3) That the verdict is contrary to the law and evidence.

/s/ SIDNEY C. VOLINN

Of attorneys for Defendant Cedric Theodore Berg.

Acknowledgment of Service attached.

[Endorsed]: Filed October 24, 1955.

In the United States District Court, Western
District of Washington, Northern Division

No. 49239

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CEDRIC THEODORE BERG,

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 1st day of November, 1955, the attorney for the Government, and the defendant, Cedric Theodore Berg, appearing in person and being represented by Louis Rousso and Sidney Volinn, his attorneys, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given to the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof; that the Probation Officer of this district has made a presentence investigation and report to the Court; now, therefore,

It is adjudged that the defendant has been convicted by jury verdict and is guilty of the offense of violation of Section 2422, Title 18, U.S.C., as charged in Count I of the Indictment, there being only one count in the Indictment herein, and the Court having asked the defendant whether he has anything to say why judgment should not be pro-

nounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged in Count I and is convicted.

It is adjudged and ordered that the defendant, on Count I of the Indictment, be committed to the custody of the Attorney General of the United States for imprisonment in such institution as the Attorney General of the United States or his authorized representative may by law designate for the period of eighteen (18) months.

It is further ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in open court this 1st day of November, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ MURRAY B. GUTERSON,
Asst. United States Attorney.

(Vio. White Slave Traffic Act.)

[Endorsed]: Judgment Filed and Entered Nov. 1, 1955.

In the United States District Court, Western
District of Washington, Northern Division

No. 49239

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VICTORIA RUTH FOUGHTY HELLER,

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 1st day of November, 1955, the attorney for the Government, and the defendant, Victoria Ruth Foughty Heller, appearing in person and being represented by Max Kosher, her attorney, the Court finds the following:

That prior to the entry of her plea, a copy of the Indictment was given to the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof; that the Probation Officer of this district has made a presentence investigation and report to the Court; now, therefore,

It is adjudged that the defendant has been convicted by jury verdict and is guilty of the offense of violation of Section 2422, Title 18, U.S.C., as charged in Count I of the Indictment, there being only one count in the Indictment herein, and the Court having asked the defendant whether she has anything to say why judgment should not be pro-

nounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged in Count I and is convicted.

It is adjudged and ordered that the defendant, on Count I of the Indictment, be committed to the custody of the Attorney General of the United States for imprisonment in such institution as the Attorney General of the United States or his authorized representative may by law designate for the period of two (2) years.

It is further ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in open court this 1st day of November, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ MURRAY B. GUTERSON,
Asst. United States Attorney.

(Vio. White Slave Traffic Act.)

[Endorsed]: Judgment Filed and Entered Nov. 1, 1955.

[Title of District Court and Cause.]

**ORDER DENYING DEFENDANT'S MOTION
FOR ACQUITTAL AND FOR A NEW TRIAL**

This matter having come on regularly for hearing, before the undersigned Judge in the above-entitled Court, the plaintiff appearing by its counsel and defendant, Victoria Ruth Foughty Heller, appearing in person and with her attorney, Max Kosher, and the Court having taken the Motion for acquittal under advisement, and the Court being fully advised herein, now, therefore,

Ordered, adjudged and decreed that the Motion for judgment of acquittal of the defendant, Victoria Ruth Foughty Heller, notwithstanding the verdict of the jury be, and the same is hereby denied, and it is further

Ordered, adjudged and decreed that the Motion of the defendant, Victoria Ruth Foughty Heller, for a new trial be, and the same is hereby denied.

Done in open court this 3rd day of November, 1955.

/s/ WILLIAM J. LINDBERG,
Judge of the above-entitled Court.

Presented by Max Kosher, Attorney for Defendant, through Murray Guterson, Assistant United States Attorney.

[Endorsed]: Filed November 3, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Victoria Ruth Foughty Heller, 4140 S.E. 84th, Mercer Island, Washington.

2. Max Kosher, Attorney for Defendant, 2919 Wetmore Avenue, Everett, Washington.

3. The offense. Title 18, U.S.C. Section 2422, (Violation of the Mann Act—Inducing a woman to go in interstate commerce for the purpose of prostitution).

4. Judgment, Sentence and Commitment was entered on the 1st day of November, 1955, by the Honorable William J. Lindberg, Judge of the above-entitled court, adjudgment that the defendant, Victoria Ruth Foughty Heller, had been convicted by a jury verdict and was guilty of the crime or offense of violation of Title 18, U.S.C., Section 2422; adjudging further that the defendant, Victoria Ruth Foughty Heller, be committed to the custody of the Attorney General of the United States for imprisonment in such institution as the Attorney General of the United States, or his authorized representative may by law designate for the period of Two (2) years, and adjudging further that the Clerk of the above-entitled Court deliver a certified copy of the Judgment, Sentence and Commitment to the United States Marshal, or other qualified officer, and that said certified copy serve as a commitment of the defendant.

5. That the defendant has not been confined, but has been admitted to bail.

That the defendant, Victoria Ruth Foughty Heller, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated Judgment.

Dated this 2nd day of November, 1955.

/s/ MAX KOSHER,
Attorney for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed November 3, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Cedric Theodore Berg, in custody.

Name and address of appellant's attorney: None.

Offense: Cedric Theodore Berg did knowingly, wilfully and unlawfully persuade, induce and entice a female person to go from San Francisco, California to the Northern Division of the Western District of Washington with the intent that she engage in practice of prostitution, debauchery and other immoral purposes and did knowingly cause her to go and be transported upon a common carrier in interstate commerce; all in violation of Section 2422, Title 18, United States Code.

Judgment and Sentence: Entered November 1, 1955, adjudging the defendant had been convicted by jury verdict and is guilty of violation of Section 2422, Title 18, U.S.C. as charged in Count I of

the Indictment and sentencing defendant to imprisonment in such institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Eighteen (18) months.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment and sentence.

Dated November 10th, 1955.

/s/ CEDRIC THEODORE BERG,
Appellant.

/s/ MILLARD P. THOMAS,
Witness.

Acknowledgment of Service attached.

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) of the Federal Rules of Criminal Procedure, I am transmitting the following original

papers in the file dealing with the action, excluding exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Indictment, filed June 22, 1955.
2. Marshal's return on bench warrant (Heller, unexecuted, filed July 1, 1955.)
3. Notice of Appearance of William H. Mullen for Defendant Berg, filed July 28, 1955.
4. Marshal's return on bench warrant, Berg, filed Aug. 1, 1955.
5. Notice of Withdrawal of attorney William H. Mullen, filed 8-3-55.
6. Order Granting Leave to Defense Counsel Mullen to Withdraw, filed Aug. 8th, 1955.
7. Notice of Appearance of Defendant Heller, through attorney Max Kosher, filed Sept. 14, 1955.
8. Praecipes for subpoenas, Barrowman, et al., behalf Government, filed Sept. 17, 1955.
9. Praecipe, government, for subpoenas, Warren, et al., filed 9-20-55.
10. Praecipe, government, for subpoenas, Fick, et al., filed 9-21-55.
11. Praecipe, government, for subpoenas, Gentile, et al., filed Sept. 23, 1955.
12. Praecipe, government, for subpoenas, La-Rossa, et al., filed September 26, 1955.
13. Praecipe, defendants, for subpoenas, Mayes, et al., filed 9-27-55.
14. Marshal's return on subpoenas, Etcheverry, et al., filed 9-27-55.

15. Marshal's return on subpoenas, LaRossa, et al., filed 9-27-55.

16. Plaintiff's Requested Instructions, filed 9-27-55.

17. Marshal's return on subpoena, Barrowman, filed 9-28-55.

18. Memorandum of Authorities, government, filed 9-29-55.

19. Defendant Berg's Requested Instructions, filed 9-29-55.

20. Requested Instructions of Defendant Heller, filed 9-29-55.

21. Verdict, filed September 30, 1955.

22. Marshal's return on subpoenas, Gentile, et al., filed 9-30-55.

23. Marshal's return on subpoena, Bard, filed 9-30-55.

24. Marshal's return on subpoena, Mayes, et al., filed 9-30-55.

25. Marshal's return on subpoena, McDowell, filed 9-30-55.

26. Bail bond, additional, Heller, pending sentence, filed 9-30-55.

27. Marshal's return on subpoenas, Baffona, et al., filed 9-30-55.

28. Marshal's return on subpoenas, Warren, et al., filed 10-3-55.

29. Motion Defendant Heller for Judgment of Acquittal notwithstanding the verdict, or for New Trial, filed 10-3-55.

30. Marshal's return on subpoena, Fick, filed 10-6-55.

31. Memorandum in Opposition to Motion for Judgment of Acquittal, etc., filed by government Oct. 17, 1955.

32. Additional Memorandum in Opposition to Motion for Judgment of Acquittal, etc., filed 10-19-55.

33. Motion Defendant Berg for Judgment of Acquittal NOV, or for New Trial, filed Oct. 24, 1955.

34. Memorandum Brief of Defendant Berg in Support of Motion for Judgment NOV, etc., filed 10-26-55.

35. Brief in Support of Dependant Heller's Motion for Arrest of Judgment, filed 10-26-55.

36. Memorandum Concerning Proof of Common Carrier, filed 10-28-55.

37. Affidavit of Service by Mail, filed 10-28-55.

38. Judgment, Sentence and Commitment, Berg, filed Nov. 1, 1955.

39. Judgment, Sentence and Commitment, Heller, filed 11-1-55.

40. Bond on appeal, Defendant Heller, filed 11-1-55.

40-a. Order Denying Defendant's Motion for Acquittal and for a New Trial, filed Nov. 3, 1955.

41. Notice of Appeal, Heller, filed Nov. 3, 1955.

42. Statement of Points on Which Appellant Heller will rely, filed Nov. 3, 1955.

43. Affidavit, Berg, to Proceed IFP, filed 11-10-55, with Order endorsed thereon granting leave to file Notice of Appeal pursuant to USC T. 28, Sec. 1915.

44. Notice of Appeal, Berg, filed Nov. 10, 1955.

45. Bond on appeal, Berg, filed Nov. 14, 1955.

46. Request, Berg, to leave jurisdiction pending appeal, filed 11-25-55.

47. Consent of Surety to leaving of jurisdiction by Defendant Berg, filed 11-25-55.

48. Petition Heller for Extension of Time to docket appeal, filed Nov. 28, 1955.

49. Order extending time of both defendants to Jan. 21, 1956 in which to file record on appeal, filed 11-28-55.

50-a, b, c. Court Reporter's Transcript of Proceedings (3 volumes), filed Jan. 17, 1956.

In witness whereof I have hereunto set my hand and affixed the official seal of said court at Seattle this 17th day of January, 1956.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

Number 49239

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CEDRIC THEODORE BERG and VICTORIA
RUTH FOUGHTY HELLER,

Defendants.

TRANSCRIPT OF TRIAL PROCEEDINGS

had in the above-entitled and numbered cause, before a Petit Jury, duly empaneled, and before the Honorable William J. Lindberg, a United States District Judge, at Seattle, Washington, commencing at 10:00 o'clock, a.m., on the 27th day of September, 1955. [1]*

Appearances: Murray B. Guterson, Assistant United States Attorney, Western District of Washington, Seattle, Washington, appeared for and on behalf of the Plaintiff; and Max Kosher, Spriestersbach Building, Everett, Washington, appeared for and on behalf of the Defendant Heller; and Louis Rousso, 725 Central Building, Seattle, Washington, and Sidney C. Volinn, 865 Olympic National Building, Seattle, Washington, appeared for and on behalf of the Defendant Berg.

* Page numbering appearing at top of page of Reporter's original Transcript of Record.

Whereupon, the following proceedings were had,
to-wit: [2]

* * * * *

ROSE DRUCILLA WEST DILL

upon being called as a witness for and on behalf of
the Plaintiff, and upon being first duly sworn, testi-
fied as follows:

Direct Examination

By Mr. Guterson:

Q. Now, will you speak very loudly in response
to all the questions so that everyone can hear you.

Will you state your full name, please?

A. Rose Drucilla West.

Q. Is that your name at the present time?

A. I am married now; Dill.

Q. How do you spell your last name now?

A. D-i-l-l (spelling).

Q. In April, 1955, your name was Rose Drucilla
West? A. Yes, sir.

Q. Is that your maiden name?

A. (Witness nodded in the affirmative.)

The Court: You will have to speak up. The re-
porter can not get the nod.

By Mr. Guterson:

Q. In April, 1955, where were you living, Miss
West? [14] A. In Los Banos.

Q. Where is Los Banos?

A. In the San Joaquin Valley of California.

Q. About how far is it from San Francisco?

A. About 126 miles.

(Testimony of Rose Drucilla West Dill.)

Q. Previous to your marriage have you ever been married? A. Yes, sir.

Q. Do you have any children? A. One.

Q. A girl or a boy? A. A girl.

Q. How old is she? A. Three and a half.

Q. What is your address at the present time?

A. Now?

Q. Yes.

A. Route 1, Box 179B, Dos Palos, California.

Q. California? A. Yes.

Q. How far is that from Los Banos, California?

A. About twelve miles.

Q. Do you recognize the Defendant, Cedric [15] Theodore Berg, in the court room, Miss West?

A. Yes, sir.

Q. Will you point him out to us, please?

A. (Witness pointed to Defendant Berg.)

Q. Will you identify him?

Mr. Volinn: We will admit that Mr. Berg knows her and——

The Court (Interposing): Will you stipulate that she has identified him?

Mr. Volinn: Yes.

Mr. Guterson: Thank you.

By Mr. Guterson:

Q. (Continuing): Do you recall where it was that you first met Mr. Berg?

A. Sometime in 1949.

Q. In 1949? A. Yes.

Q. Do you remember in what city that was that you met him? A. In Los Banos.

(Testimony of Rose Drucilla West Dill.)

Q. How long had you lived in Los Banos in 1949?

A. I moved there in June, 1949.

Q. Where had you lived before that?

A. I was living in Firebaugh and part of the [16] time in Los Banos.

Q. Where is Firebaugh?

A. About thirty-four miles from Los Banos.

Q. How long had you been living there?

A. I came to Firebaugh in 1946.

Q. In 1946? A. 1946.

Q. Where had your home been before 1946?

A. My home was Arkansas.

Q. From 1946 to 1949 you say you were living in both Firebaugh and Los Banos at different times?

A. Yes, sir.

Q. Were you working?

A. Working in Firebaugh.

Q. What kind of work were you doing?

A. Prostitution.

Q. In Firebaugh, California?

A. Yes, sir.

Q. Were you working as a prostitute when you first met Mr. Berg?

Mr. Volinn: Excuse me. I will object to questioning along this line. I don't see its materiality at the present time.

The Court: It isn't apparent. [17]

Mr. Guterson: Well, I wanted—it will all be tied up. I wanted to show preliminarily how she knows the Defendant and where she met him.

(Testimony of Rose Drucilla West Dill.)

Mr. Volinn: There is no showing or intimation that Mr. Berg had anything to do with that or knew anything about it.

The Court: It may go to knowledge.

Mr. Guterson: I will withdraw that, if your Honor please.

By Mr. Guterson:

Q. (Continuing): Do you remember whether or not Mr. Berg was employed when you first met him?

A. I don't know whether he was on the ship or employed or not when I first met him.

Q. Do you know where his home was in 1949?

A. It was on the Chico Highway. He was living with his mother.

Q. Is that near Los Banos?

A. The highway went through Los Banos.

Q. Did you see Mr. Berg very often during that period?

A. Well, I used to see him off and on up town.

Q. Were you employed as a prostitute at that time?

Mr. Volinn: I will object.

The Court: Objection sustained.

By Mr. Guterson:

Q. (Continuing): Where did you see Mr. Berg?

A. In Los Banos.

Q. Where in Los Banos?

A. I think the first time I met him was at the Los Banos Club, that I remember.

Q. And then where did you see him thereafter?

(Testimony of Rose Drucilla West Dill.)

A. Then I saw him after that when he came to Firebaugh when I was working, and I used to see him at Los Banos when I went over there home.

Q. I see. Did you see Ted Berg again during the summer of 1954? A. Yes, sir.

Q. And where was that; in what city?

A. In Los Banos.

Q. That was still your home?

A. Yes, sir.

Q. And do you recall where it was you saw him in the summer of 1954? [19]

A. Well, he came out where I was living and I saw him, and we were uptown.

Q. And did you have any conversation with him at that time, Miss West?

A. Well, he was talking then about me——

Mr. Kosher: Just a moment now. If your Honor please, at this time on behalf of the Defendant Victoria Heller I object to any conversation that this witness may have had with the Defendant Berg outside the presence or hearing of Mrs. Heller on the grounds it is hearsay as to her.

The Court: Does this conversation have something to do with——

Mr. Guterson (Interposing): Yes, if your Honor please.

The Court: Well, the Court will instruct the jury that this testimony of any conversation, unless otherwise connected up, is not to be considered at all as to the Defendant Heller but only as to the Defendant Berg.

(Testimony of Rose Drucilla West Dill.)

Mr. Guterson: We submitted an instruction right along those lines, your Honor.

By Mr. Guterson:

Q. Will you relate the conversation you had with Mr. Berg in Los Banos during the summer of [20] 1954?

A. He was talking about me coming up here. He said he was coming back to go on a ship.

Mr. Volinn: Just a minute.

Mr. Guterson: Excuse me.

Mr. Volinn: I would make an objection to that. The foundation is wrong. There is quite an extensive area in time and latitude of space.

The Court: I suggest you fix a time and place and persons present.

Mr. Guterson: All right.

By Mr. Guterson:

Q. Do you know what month you saw Mr. Berg during the summer of 1954? A. In August.

Q. Now, do you recall where it was you saw him?

A. He came out by the ranch where I was living, and I saw him in town.

Q. Is that the ranch near Los Banos?

A. Yes, sir.

Q. And when you say "in town" you mean Los Banos? A. Yes, sir.

Q. Did you have a conversation on one of [21] these occasions, either at the ranch or in town?

A. When we were talking we were in the car riding from the ranch into town.

(Testimony of Rose Drucilla West Dill.)

Mr. Kosher: We object on the grounds it is not responsive.

The Court: The Court doesn't feel it should be stricken. It is related.

By Mr. Guterson:

Q. Where were you and Mr. Berg when you had a conversation with him in August, 1954?

A. In the car riding from the ranch into town.

Q. In whose car was it?

A. It was his car at the time.

Q. Now, will you tell us what the conversation was and what you said and what he said.

A. He was wanting me to come to Seattle. He said he was coming back and going on a ship and he would write me a letter, and said something about me coming up here; and he wrote me a letter and I never answered it.

Q. Just the conversation in the car.

Mr. Volinn: She has already answered that.

Mr. Guterson: Has she? All right. [22]

The Court: It will stand unless there is a motion against it.

By Mr. Guterson:

Q. (Continuing): Not anything about any letters, but just what you and Mr. Berg talked about while driving in his car.

A. Well, he said when I came up in Seattle that there was work in Seattle.

Q. What kind of work?

A. Prostitution is what he was talking about.

(Testimony of Rose Drucilla West Dill.)

Mr. Volinn: I will object to the question as leading.

The Court: The answer may be stricken. What we want is what he said and not inferences.

By Mr. Guterson:

Q. Just tell us what he said and what you said in response to him.

A. He said if I wanted to come up here and work that when he came back in that he would call me when his ship came back in, and then I didn't hear from him any more until he came home.

Q. Was there any further conversation?

A. Not at that time there weren't.

Q. This is in August, 1954. Do you recall [23] approximately when it was you next saw Mr. Berg?

A. It was in March of 1955.

Q. This year? A. Yes, sir.

Q. All right; in March, 1955, where was it you saw Mr. Berg?

A. He came out—I was living in Los Banos and he came out to my house, Ricky's Tavern on the Chico Highway, one-and-a-half miles out of Los Banos.

Q. You were living there in March?

A. Yes, sir.

Q. Did you have a conversation with Mr. Berg on that occasion? A. Yes.

Q. Will you tell us what you said and what he said in this conversation?

A. He told me he knew this lady up here and he had been staying out at her house.

(Testimony of Rose Drucilla West Dill.)

Mr. Kosher: Just a minute. Again I object to this on the ground it is hearsay; conversation outside this Defendant's presence and hearsay as to her.

The Court: The Court again instructs the jury that any conversations that may be related [24] should be considered solely with relation to that defendant and not binding, nor should it be given consideration, with respect to the Defendant Heller.

By Mr. Guterson:

Q. All right; now, with regard to this meeting and conversation with Mr. Berg in March, 1955, will you just tell us what he said and what you said to him?

A. Well, he was wanting me to come to Seattle.
The Court: What he said.

A. (Continuing): He said for me to come to Seattle and he was coming back and he would check on it and then he wanted me to come up.

By Mr. Guterson:

Q. Did he say anything further; did you say anything further about whether you would or wouldn't?

A. I told him then I would come up and he said he would let me know when he got back up here.

Q. Just relating to the times which you saw him, did anyone, either you or he, say why he wanted you to come to Seattle?

A. No, there was no one present at the time.

Q. Just the two of you? [25] A. Yes.

(Testimony of Rose Drucilla West Dill.)

Q. What kind of work did he say he wanted you to come to Seattle for?

Mr. Volinn: That is a leading question.

The Court: Objection sustained.

By Mr. Guterson:

Q. (Continuing): Was there anything further said, Miss West?

A. Well, when he told me about the house of prostitution he said it was O. K., nothing to worry about, everything was all right, and that is all he said.

Q. Did you say he mentioned a lady's name; did he say anybody's name?

A. He said Vicky is all; at the time that is all he said.

Q. Did he say anything further at all about Vicky?

A. He just said that she had her place and it was O. K. and that she had a good set up there.

Q. Did you agree to come up here at that time or not?

A. Yes, I said I would come up.

Q. Now, when was the next time following [26] this conversation that you had with Mr. Berg in March—when was the next time you spoke to Mr. Berg?

A. He called me on a Sunday morning early in the morning around six o'clock.

Q. O.K. A. That was on the 3rd.

Q. Where were you when you received the telephone call? A. I was home.

(Testimony of Rose Drucilla West Dill.)

Q. Where was your home?

A. That was Los Banos.

Q. And what was your address at that time; where were you living?

A. I got my mail in town because the route mail didn't go out.

Q. Where was your home?

A. Ricky's, Apartment Number Five.

Q. Ricky's, Apartment Number Five?

A. Yes.

Q. And do you recall what your telephone number was at Ricky's Apartments? A. 2404.

Q. Excuse me? A. 2404. [27]

Q. 2404?

A. (Witness nodded in the affirmative.)

Q. About what time did the telephone call come?

A. It was real early in the morning, around six o'clock.

Q. Do you recall what day of the week it was?

A. Third, on Sunday morning.

Q. Did you answer the 'phone yourself?

A. Yes, sir.

Q. And when you answered the 'phone, who was on the other end of the 'phone? A. Ted.

Q. Did he identify himself to you?

A. Yes. Well, I knew his voice too.

Q. I see; what did Mr. Berg say to you?

A. Well, he asked me how I was and then he said, "I want you to meet Vicky."; and he wanted to know if I wanted to come up; and I did not see him just before he left and he said he came back and

(Testimony of Rose Drucilla West Dill.)

wanted to be sure everything was O. K. before he sent for me. Then he introduced me to Vicky over the 'phone.

Q. Did you talk to a lady over the telephone?

A. Yes, sir.

Q. Was this the lady that Mr. Berg introduced you to over the telephone? A. Yes, sir.

Q. What conversation did you have with the lady over the telephone?

Mr. Kosher: Just a minute. I object to that as hearsay unless she can identify the Defendant Heller as the person to whom she talked, which would be a physical impossibility if she was in Los Banos.

The Court: What representation do you make?

Mr. Guterson: This will all be tied up in the orderly presentation when the witness does come to Seattle.

I will go into some more preliminary questions.

The Court: This isn't a conspiracy case. I think probably the objection should be sustained at this time.

Mr. Kosher: May we ask the Court to instruct the jury to disregard any statement she made with reference to being introduced to a woman by the name of Vicky? [29]

The Court: She is just repeating a conversation with the Defendant Berg.

Mr. Guterson: Yes.

The Court: Again, of course, I advise the jury

(Testimony of Rose Drucilla West Dill.)

that these conversations are to be considered only with relation to the Defendant Berg at this time.

Mr. Guterson: All right.

By Mr. Guterson:

Q. (Continuing): With regard to the conversation with Mr. Berg on this Sunday morning, will you tell us what he said to you?

A. Well, he told me—he asked me if I would come up there.

The Court: Excuse me just a moment. The objection, of course, was only as to the conversation with the woman.

Mr. Guterson: Yes; now going into the conversation with the man, Mr. Berg, whom she knows.

By Mr. Guterson:

Q. Will you go ahead?

A. He was talking to me and he said, "Come on up.", and everything was O. K. and I had nothing to worry about, and he said it was all right and I [30] said I would come up and we hung up then.

Q. Did you immediately leave Los Banos after this; after this 'phone call? A. No, sir.

Q. All right; when was the next time you spoke to Mr. Berg, do you remember?

A. In a couple of days after that he called again.

Q. By telephone again? A. Yes.

Q. Where did you receive that call?

A. At my number, 2404.

Q. And when you answered the 'phone, who was on the other end of the line? A. Teddy.

(Testimony of Rose Drucilla West Dill.)

Q. Will you tell us what he said to you on that occasion?

A. He asked me why I hadn't come up and I said, "Well, it was Easter Sunday and my sister and them were coming."; and I said, "I didn't have the money to come up on."; and they said they would send me the money, he would send me the money, to come up on.

Q. Do you recall whether or not you ever received any money?

A. I received the money on the 7th. [31]

Q. Of April? A. Of April.

Q. Where did you go to get the money?

A. The American Trust Bank at Los Banos.

Q. At Los Banos? A. At Los Banos.

Q. And how much money did you receive?

A. Sixty dollars.

Q. When was the next time you talked to Mr. Berg?

A. It was on about the 11th, or 9th, 10th or 11th.

Q. Was that by telephone also?

A. Yes, sir.

Q. Where did you receive that call?

A. At 2404.

Q. In Los Banos? A. In Los Banos.

Q. All right; and what did Mr. Berg say on that occasion?

A. He wanted to know if I got the money and if I was coming up and why I hadn't left, and I said, "I will leave today and I will call you back."; and

(Testimony of Rose Drucilla West Dill.)

then I called them back and I left that night, that Tuesday night.

Q. How did you travel from Los Banos to [32] San Francisco?

The Court: I notice it is a little bit late. I think we will have a recess now.

Mr. Guterson: All right.

* * * * *

By Mr. Guterson:

Q. Miss West, I will hand you what at this stage has simply been marked Plaintiff's Exhibit 1 for identification purposes only. Can you tell me [34] whether or not your name appears thereon?

A. Yes, sir.

Q. And is it your signature? A. Yes, sir.

Q. Thank you. Now, do you recall whether or not that was the document you signed in order to receive the sixty dollars from the American Trust Company? A. Yes, sir.

Q. Now, I will direct your attention, if I might, to the conversation you had on the telephone on the same day you left Los Banos. Will you tell us again what that conversation was with Mr. Berg?

Mr. Kosher: I object to that on the ground it is repetitious.

The Court: It has been given once.

Mr. Guterson: She said something about a conversation on the 10th. This is the 12th I am asking about now.

Mr. Volinn: As I understand——

(Testimony of Rose Drucilla West Dill.)

Mr. Guterson: If it was, I will withdraw the question.

The Court: I will ask the witness.

Was this conversation given before when you testified or is it another conversation in addition [35] to that which you testified to on the 10th or 12th?

The Witness: The last day I left, on the 12th, I told him I would come up and I told him what time I was leaving.

The Court: And you left that night?

The Witness: Yes.

The Court: You gave that conversation. That was the last conversation referred to.

Mr. Volinn: That is right.

The Court: And she stated she left that night.

Mr. Guterson: All right.

By Mr. Guterson:

Q. (Continuing): When you left Los Banos, how did you travel to San Francisco?

A. My neighbors next door drove me to the airport.

Q. Can you tell us the names of the people who drove you?

A. Joe Scarpete, Tony and Pat Baffuna.

Mr. Volinn: I didn't hear the last name.

The Witness: Tony and Pat Baffuna.

The Court: Three persons? [36]

The Witness: Yes, sir.

By Mr. Guterson:

Q. Do you recall whose car it was you were driving in?

(Testimony of Rose Drucilla West Dill.)

A. Pete's car; Joe Scarpete's.

Q. About what time, if you remember, did you leave Los Banos?

A. Around eight o'clock something.

Q. In the morning or evening?

A. In the evening.

Q. About what time, if you remember, did you arrive at San Francisco?

A. Eleven; about one-half hour before the plane left; around eleven.

Q. Where did Mr. Scarpete drive you?

A. He drove me right to the airport and I got out and went in and they left.

Q. Did you have any luggage or baggage with you? A. I had two luggage.

Q. Where was it kept during the ride from Los Banos to San Francisco?

A. It was in the car.

Q. And where did they leave you off?

A. They left me off right in front of the [37] airport and I went right in with my luggage.

Q. And did they leave? A. Yes, sir.

Q. Did you have your airplane ticket at that time?

Mr. Volinn: I will object.

The Court: Objection sustained.

By Mr. Guterson:

Q. (Continuing): What did you next do, Miss West, after they left?

A. Just before I left Los Banos I called the airport to see if I could get on the plane and when

(Testimony of Rose Drucilla West Dill.)

they left me off I went up to the Western Airline there and gave my name and got my ticket.

Q. Do you remember how much it cost you for your airplane ticket?

A. Thirty-four dollars and a little bit over.

Q. And where was it you were going; from San Francisco to where?

A. I was coming from there to the Seattle airport.

The Court: Seattle what?

The Witness: The airport; came there.

By Mr. Guterson:

Q. About what time of night did you leave [38] San Francisco?

A. I left at 11:45, right around midnight. The plane was a little late.

Q. Do you recall approximately what time you got into the airport in the Seattle area?

A. Between five-thirty and six.

Q. That morning? A. That morning.

Q. What did you do after you got off the airplane in Seattle?

A. I went to the 'phone and called.

Q. What number did you call?

A. Adams 5680.

Q. Excuse me? A. Adams 5680.

Q. What number was that?

A. That was Vicky's number at her home.

Q. Who had told you to call that number?

A. Teddy gave me the number to call.

(Testimony of Rose Drucilla West Dill.)

Q. In one of your previous 'phone conversations?

A. (Witness nodded in the affirmative.)

Mr. Volinn: That is quite leading.

The Court: They are quite leading.

Mr. Kosher: We also renew our objection [39] to the extent that this is hearsay against the Defendant Heller.

The Court: I think that is covered by the Court's instruction to the jury. Any conversation with the Defendant Berg, alleged conversation with the witness, is hearsay so far as the Defendant Heller is concerned and not to be considered in connection with her guilt or innocence.

Mr. Guterson: Thank you, your Honor.

By Mr. Guterson:

Q. When you dialed Adams 5680 did someone answer the 'phone?

A. Vicky answered the 'phone.

Q. How many times did you call from the airport?

A. She answered the 'phone and she told me to get a cab. They were going to meet me and they didn't have a car and she told me to get a cab and come out to the house and she gave me the address and I didn't write it down and I wasn't sure of the address so I turned around and called again to be sure I had the right address.

Q. And who did you talk to then?

A. The second time I called I talked to both of them. [40]

(Testimony of Rose Drucilla West Dill.)

Q. What did you do after speaking on the telephone?

A. I got a cab and told him the address and went over there.

Q. About what time in the morning did you arrive?

A. A little after six when I got there; between six and seven, maybe.

Q. I see; now, do you recall where this house was that you came to?

A. It was 84th Southeast. I don't remember just the exact number. Mercer Island.

Q. Mercer Island? A. Mercer Island.

Q. Did you go in the house?

A. The cab drove up and Teddy came out the door and met me and took me in.

Q. Was there anyone at the house besides Ted Berg? A. Not at that time.

Q. Did Ted take you in the house?

A. Yes, sir.

Q. Did you get introduced to anyone else?

A. Well, Vicky was right there when I walked in by the kitchen and she said, "I am Vicky." [41]

Q. Now, do you recognize the woman that Ted Berg introduced you to on the morning of April 13, 1955; is she present in the court room at this time? A. Yes, sir.

Q. Will you point her out for the court and jury?

A. There. (Witness pointed to Defendant Heller.)

(Testimony of Rose Drucilla West Dill.)

Q. The girl in black with the white collar?

A. Yes, sir.

Q. What did Mr. Berg say to you in Mrs. Heller's presence when he introduced you to her?

A. He said, "This is Vicky."; and she said, "I am Vicky you met over the 'phone when talking to you."

Q. She said that?

A. Yes. She said, "I am Vicky."

Mr. Volinn: Excuse me. I didn't hear that statement.

(Whereupon, the following was read by the reporter: "Q. Yes. She said, "I am Vicky.")

Mr. Volinn: Well, now——

(Whereupon, there was a brief pause.) [42]

By Mr. Guterson:

Q. Now, Miss West, I will direct your attention back to the first 'phone call that you received on an early Sunday morning that you related about before.

At that time did you speak to someone named Vicky? A. Yes, sir.

Q. Now, will you relate the conversation that you had with Vicky?

Mr. Kosher: Object to that on the ground that it is hearsay.

Mr. Guterson: Your Honor, at this time I think we have laid a sufficient foundation. Now that she met her in person we can go back and tie up the matter.

The Court: I will skip it now and hear from

(Testimony of Rose Drucilla West Dill.)

Counsel after the recess in view of the objections. If you have any authorities to submit, I will hear from both sides.

Mr. Guterson: Shall I go on to another subject?

The Court: Yes, and then you can go back.

Mr. Guterson: Thank you. [43]

By Mr. Guterson:

Q. (Continuing): After you were introduced to Mrs. Heller by Mr. Berg when you arrived at the house, did you have any conversation with the two of them?

A. Teddy went on in the back and she was telling me——

Q. (Interposing): Who is “she”?

A. Vicky told me about the way that she worked the prostitution and the way she took the money out and everything.

Mr. Volinn: I will object to this conversation.

The Court: You are asking for a conversation now, is that right?

Mr. Guterson: Yes.

The Court: I think in these conversations you should establish where it was and who was present before you ask for any conversation.

Mr. Guterson: All right.

By Mr. Guterson:

Q. Now, your conversation then was with Mrs. Heller, is that correct? A. Yes, sir.

Q. And where were you and Mrs. Heller at [44] when you conversed.

(Testimony of Rose Drucilla West Dill.)

A. We were sitting at a little table in the kitchen.

Q. At her home? A. At her home.

Q. Was Mr. Berg in the room?

A. He had stepped back in the bathroom, or one of the bedrooms when she was telling me.

Q. Now, will you relate the conversation. This was the first morning you arrived in Seattle?

A. (Witness nodded in the affirmative.)

Mr. Volinn: I will make a formal objection to the answer inasmuch as it is hearsay insofar as the Defendant Berg is concerned.

The Court: Any conversation not held in the presence of another defendant is not to be considered with relation to that defendant if he were not present.

Mr. Guterson: Thank you, your Honor.

The Court: Now, in giving these conversations, the purpose is—we are seeking the words spoken by you and by the person with whom you were speaking. If you don't recall the exact words you can give the substance; but, to begin [45] with, attempt to repeat the conversation as it occurred.

Mr. Guterson: Thank you.

By Mr. Guterson:

Q. Would you repeat, as best you can, the conversation you had with Mrs. Heller?

A. Well, she told me—Mrs. Heller told me—if I stay in the house and she had all the customers and they all came by call, and if I stay in the house she takes three dollars out of ten dollars

(Testimony of Rose Drucilla West Dill.)

when I have intercourse with the men when they pay me, and if I go out she takes four dollars out of the ten dollars. That is the way she divided up the money.

Q. What did you say to her in response to this conversation?

A. I just listened to her when she told me and I said O.K.

Q. Had you brought your baggage with you from your trip out to the home there?

A. Yes, sir.

Q. Did you stay at the home or did you stay somewhere else? A. No, sir, I stayed there.

Q. What did you do that day; that is, Wednesday, [46] April 13, 1955? Do you recall what it was you did that day?

A. During that day I went to bed and slept until about noon and then I had—I turned—I had intercourse with one man that day, that morning, that day there.

Q. Did you receive any money for that act of intercourse?

Mr. Volinn: Wait a while. I am having difficulty hearing the witness here. I wonder if she could speak more slowly.

The Court: And speak louder.

Mr. Rousso: May we have the last question?

The Court: The Reporter will read the last question.

(Testimony of Rose Drucilla West Dill.)

(Whereupon, the following was read by the reporter: "Q. Did you receive any money for that act of intercourse?")

Mr. Guterson: Was there a further question?

A. Thirty dollars.

By Mr. Guterson:

Q. Do you recall what you did the remainder [47] of that day, that same day?

A. That was all that day, that Wednesday.

Q. Did you stay at the house or did you go anywhere?

A. I stayed at the house.

Q. Was there anybody at the house besides Mrs. Heller and Mr. Berg and yourself?

A. Just the children was all.

Q. What children?

A. Her two boys; there were two boys.

Q. Do you know about how old they were?

A. About eight and eleven, or twelve.

Q. During the time that you said you had intercourse with one man and received thirty dollars, was Mrs. Heller at the home at that time?

A. Yes, sir, she was.

Q. Was Mr. Berg in the home at that time?

A. Yes, sir.

Q. Did you remain at the house over night?

A. Yes, sir.

Q. Were you there the next day, Thursday, April 14th? A. Yes, sir.

Q. What did you do on Thursday?

(Testimony of Rose Drucilla West Dill.)

A. That Thursday they went down town and I stayed. [48]

Q. Who is "they"?

A. Vicky and Teddy went down town and I stayed home and she told me if the 'phone rang to answer and tell them to leave a number so that she could call back because she was downtown, and I was there all day and I cleaned house and a yard man came by there and I saw him when I was cleaning and I talked to him and they called earlier and said they was going to bring groceries and they didn't come in until around ten o'clock and they woke me up and I had intercourse with two guys that Thursday, later in the night.

Q. Did you receive money for these two other acts of intercourse on Thursday?

A. I received twenty dollars from one fellow and fifty dollars from the other.

Mr. Volinn: I didn't hear the last question.

The Court: I think it is covered. You can ask the reporter later if you want to get it.

Did the jury hear the answer? Didn't you? If the jury can't hear at any time, let me know. [49]

By Mr. Guterson:

Q. Was Mrs. Heller in the home when these acts of intercourse were performed? A. Yes, sir.

Q. Was Mr. Berg in the home? A. Yes, sir.

Q. Did you stay there at that house over Thursday night and on into Friday morning the 15th?

A. Well, Friday afternoon I went downtown with Teddy.

(Testimony of Rose Drucilla West Dill.)

Q. You were still there on Friday?

A. I was still there, yes, sir.

Q. O.K., go ahead; what did you do Friday?

A. I went downtown with Teddy and Vicky Friday afternoon and then we went back home around seven o'clock in the evening and then they left and went back downtown right after we got home.

Q. What was the total amount of money you received for acts of intercourse, Miss West?

A. One hundred dollars.

Q. What did you do with the one hundred dollars that you received?

A. I gave it to Vicky and she gave—she had on a piece of paper she was figuring it out and she gave me back sixty-two dollars. [50]

Q. What did she do with the other thirty-eight?

A. I never noticed where she put it. She kept it. She gave me the sixty-two dollars.

Q. All right. Did you stay at her home over Friday night and on into Saturday morning?

A. Until Saturday morning when I went next door to the neighbors.

Q. Was Mrs. Heller and Mr. Berg at the home Friday night; did they come back home? You said they left at seven o'clock.

A. They came back home around two o'clock or two-thirty. Saturday morning, that would be.

Q. Were there any other persons present at that time?

A. There were five people there.

Q. Men or women?

(Testimony of Rose Drucilla West Dill.)

A. And then there was one woman came in later after they came home.

Q. Five men you say came with them?

A. Five men. There was two men already in the house and three men came home with them and after they came home a while is when this other lady came.

Q. Did you sleep there Friday night? [51]

A. I slept earlier Friday night before they come home but I didn't sleep then any after they got home.

Q. What happened after they did get home about two o'clock in the morning?

A. Everybody was drinking and they were having a dice game and playing dice and they started accusing—some guy missed his money and they accused me of taking it.

Q. Who is "they"?

A. Vicky and Teddy, and that is when Vicky and Teddy started abusing me and beating me and making me sit on the floor with my clothes off, so I got a skirt and sweater on and when I got a chance I went out of the house to the neighbors through the patio door.

Q. Was this Saturday morning? A. Yes.

Q. Do you remember the name of the person whose house you went to?

A. Mrs. Margaret Keating.

Q. Did she live right next door?

A. Right next door.

(Testimony of Rose Drucilla West Dill.)

Q. What did you do with the sixty-two dollars that you kept? [52]

A. That Friday night when they came downtown, and that afternoon when we went back home they went back downtown—well, I gave it back to Vicky. She wanted to borrow it from me so I told Teddy it was in my suitcase and he went and got it and gave it back to her.

Q. I see; after you left her house on Saturday morning did you ever have any other conversation with Mrs. Heller?

A. Well, I went next door to Mrs. Keating's and she took me downtown to the Stewart Hotel and she gave me twenty dollars because I didn't have any money and I called Adams 5680 and tried to get them to give me my clothes.

Q. Who did you talk to?

A. Both Teddy and Vicky. I said I was going home and I wanted my clothes and to set them outside the door and they got real nasty over the 'phone and she said for me to give her the money and I could have the clothes and I told her I didn't have that money and they wanted to know where I was at and I told them by the airport and she said I wasn't going to get my clothes and she hung up on me and I called back again and she said, "You won't get anyplace. I reported you. You get on the street and you will be picked up"; and [53] I said, "All I want is my things"; and, "I want to go home." And Mrs. Keating then told those people to come and talk to me—the detectives.

(Testimony of Rose Drucilla West Dill.)

(Whereupon, there was a brief pause.)

Mr. Guterson: I have nothing further.

Cross Examination

By Mr. Kosher:

Q. You say your name is Mrs. Dill, is that correct?

A. Yes, sir, that is my married name now.

Q. And you were formerly known as Rose West, is that correct? A. Yes, sir.

Q. Now, is Rose West your correct name or is that an assumed name?

A. That is my maiden name.

Q. Have you ever been known under any other name?

A. I was known as Dolly when I worked at Firebaugh.

Q. Was that an assumed name, "Dolly"?

A. Yes.

Q. And what last name did you use with the name Dolly? A. Wilson. [54]

Q. Dolly Wilson; have you ever been known under any other names than the ones you indicated here?

A. That is when I was booked in the county jail here as Virginia.

Q. When you were booked in the county jail you told them your name was Virginia; did you tell them your last name? A. Wilson.

Q. Then when booked at the county jail here you gave them a false name?

(Testimony of Rose Drucilla West Dill.)

A. It was the name I went under.

Q. It was the name you went under; now, have you used any other names? A. No.

The Court: Speak up. We can't hear. Did you say, "no"?

The Witness: No, sir.

By Mr. Kosher:

Q. Did you ever use the name of Terry?

A. Terry? (Witness nodded in the negative.)

Q. Now, as I understand it, you have lived down in Los Banos, California, for some time; is that right? A. Yes, sir. [55]

Q. And what did you do for a living down there?

A. At the time when Firebaugh was open I worked in Firebaugh and after that when I lived at Los Banos I lived on the ranch with a Portuguese family and helped them on the ranch.

Q. When you say "Firebaugh was open", what do you mean by that?

A. When I worked there. I didn't work there since they closed up.

Q. What do you mean "work"?

A. Prostitution.

Q. Then you were a common prostitute down there, is that correct? A. Yes, sir.

Q. Have you ever been convicted of any crime?

A. No, sir; just——

Q. (Interposing): Never been convicted of prostitution anyplace? A. No, sir.

Q. Have you ever been convicted of disorderly conduct? A. No, sir.

(Testimony of Rose Drucilla West Dill.)

The Court: If you will, confine your [56] questions to a felony or convictions.

By Mr. Kosher:

Q. Do you understand the question that I asked you?

A. Well, I have never been convicted or did anything there, if that is what you mean. I was booked and fingerprinted at one time there.

Q. Where was that?

Mr. Guterson: This isn't proper. I don't mind him going into it but he can ask about convictions and not about booking or arrests.

Mr. Kosher: I will withdraw the question.

By Mr. Kosher:

Q. (Continuing): Did you practice prostitution anyplace other than in Firebaugh?

A. Well, I have been in San Francisco.

Q. Practicing prostitution there?

A. San Francisco, California.

Q. San Francisco, California?

A. (Witness nodded in the affirmative.)

Q. How long have you been a common prostitute?

A. Since first in 1946 and then I quit in 1952.

Q. You practiced prostitution from 1946 to 1952.
How old are you? A. Thirty-one.

Q. And you have been married, have you?

A. Yes, sir.

Q. How many times? A. Twice.

Q. And you have a little girl, have you?

A. Yes, sir.

(Testimony of Rose Drucilla West Dill.)

Q. A little girl living with you?

A. She has always lived with a family on the ranch. I didn't have her with me.

Q. You didn't have this little girl with you?

A. She wasn't living with me.

Q. You say you knew Mr. Berg down in Los Banos; is that correct? A. Yes, sir.

Q. Prior to the time you came to Seattle, Washington, I will ask you whether you have ever seen the Defendant Victoria Heller?

A. Had I ever seen her before?

Q. Yes. A. No, sir.

Q. And you did not know her at any time prior to April 13, 1955, did you?

A. Just the time that I met her over the 'phone was the first time I knew her, and when I walked in.

Q. She had never talked to you down in Los Banos, had she?

A. Just on the 'phone is all.

Q. You say you got here on the morning of—was it the 11th or 13th; the morning of the 13th?

A. The 11th or 12th; I don't remember the exact date.

Q. You don't remember when you got here. Let me ask you this: Had you been drinking at all prior to the time you left Los Banos?

A. On the way to the airport we stopped and had one beer and when I was in the airport I got two drinks and got on the plane and slept practically all the way up here, until we got to Portland.

Q. Do you remember talking to the sheriff's

(Testimony of Rose Drucilla West Dill.)

deputy sometime on Saturday after you arrived here; Saturday or Sunday?

A. After I left the house?

Q. Yes.

A. I called to see about getting my clothes.

Q. Did you talk to a deputy sheriff?

A. Yes, sir, and I told him I wanted to get my clothes. [59]

Q. Where did you talk to him?

A. I called him on the 'phone. He was over on Mercer Island.

Q. Did he come to see you?

A. No; he told me to call him back and in-between time is when the detectives came to talk to me and I didn't call back.

Q. What detectives were they; do you know?

A. It was Todd and Smith. I know one was Mr. Todd.

Q. Where did you talk to these men at?

A. Well, when I——

Q. (Interposing): Where was the conversation?

A. In the hotel room.

Q. And in what hotel?

A. Well, it was the Spring Hotel. I had been in there a little while and after I called back Teddy and——

Q. (Interposing): Very well; do you remember telling these men you had been drinking and were drunk when you got on the plane?

A. No, I didn't tell them that.

Q. You didn't tell them that? And do you [60]

(Testimony of Rose Drucilla West Dill.)

remember telling them you had turned a trick with the pilot for fifteen dollars on the way up here?

A. Those men, I didn't.

Q. Did you tell that to anybody?

A. I didn't. I slept all the way up on the plane.

Q. But you did make the statement I asked you about?

A. I didn't turn no trick.

Q. You say you got out to Mrs. Heller's house sometime between six and seven in the morning?

A. Yes, sir.

Q. And Mr. Berg came out to the car and got you?

A. He came out to the cab.

Q. And you went back in the house, is that right?

A. Yes, sir.

Q. This house you stayed at is located out on Mercer Island?

A. Yes, sir.

Q. Is it a regular residence; regular house, isn't it?

A. Yes, sir. [61]

Q. And there are houses on either side of it?

A. On one side. On the right side as you drive in there is no house.

Q. There are a number of houses in that neighborhood? In other words, it is a residential district, is it not?

A. Yes, sir, it is a residential district.

Q. And when you got there you saw Mrs. Heller's two little boys?

A. Not right at the time but I wasn't there very long when they got up to go to school.

Q. And at that time did she get the kids off

(Testimony of Rose Drucilla West Dill.)

to school; did she make breakfast for them and send them to school?

A. They ate a bowl of cereal and got dressed and went to school.

Q. And it was at this time she was supposed to have had this conversation with you, is that right?

A. They were after that, that morning.

Q. After the kids got to school?

A. No, right after I got there and then the kids got up to go to school.

Q. Was that before the kids got up to go to school? [62]

A. Yes, sir.

Q. Did you have anything to drink out at the Heller home?

A. Yes, sir, all of us was drinking.

Q. How soon after you got there did you have any liquor to drink?

A. About a couple of hours after I got there. We had some coffee first and then I was there for a little while and then we had a few drinks and I was picking up my hair at the table.

Q. You say you had a few drinks?

A. We all had a drink.

Q. How many did you have?

A. We didn't have over two or three drinks.

Q. And then you say you went to bed?

A. And then I went to sleep.

Q. Did Mrs. Heller leave the house while you were asleep?

A. No, sir.

Q. You are sure of that?

(Testimony of Rose Drucilla West Dill.)

A. She told me—well, after she left I laid back down and went to sleep and took the 'phone into the bedroom and she was trying to buy a car and going to see about this car. [63]

Q. Is that the same day you got there?

A. That morning.

Q. That morning; now, you say you had a few drinks and picked up your hair and went to bed; is that right? A. Yes.

Q. And isn't it a fact that when you went to bed Mrs. Heller left the house?

A. She told me she was going downtown and to answer the 'phone and everything, and I did.

Q. How long was she gone?

A. I don't remember how long she was gone that day, whether she came in around noon or middle of the afternoon.

Q. You don't remember when she came back?

A. Just what time she did come back right now.

Q. Isn't it a fact she didn't come back until way after dinner time, or after supper time?

A. I don't know for sure that day just what time she did come back that first day.

Q. You don't remember then when she came back? A. No.

Q. Isn't it a fact you were intoxicated on [64] that afternoon and don't remember anything what transpired that afternoon?

A. That Wednesday afternoon?

Q. Yes. A. No, sir, I wasn't.

(Testimony of Rose Drucilla West Dill.)

Q. Now, you say that you had one act of intercourse, is that right? A. Yes, sir.

Q. And do you remember with whom you had that act of intercourse?

A. I don't remember the fellow's name.

Q. Was it somebody that just came out to the house?

A. Well, as far as my knowledge, he called her.

Q. And he didn't call you, did he?

A. No, sir, he didn't.

Q. Did he call her while she was home or while she was gone?

A. She had told him to come out. She was talking to this guy over the 'phone and she said, "I have a girl friend in mind here."; and I never paid any attention to the conversation because she told me not to say anything over the 'phone.

Q. So, when the man came out there you just [65] had an act of intercourse with him; is that right?

A. She told me, "Don't ask him for the money first. When he gets through he will pay you." And, when he got through he paid me thirty dollars.

Q. You don't remember who the man was?

A. I don't remember the guy's name.

Q. You don't remember what he did for a living; he didn't tell you?

A. I didn't ask him and he didn't say. I don't know.

Q. Now, you say while you were out at the house you put your hair up in pin curls?

(Testimony of Rose Drucilla West Dill.)

A. I did that morning right after we got in.

Q. Isn't it a fact when you came to the house you had your hair in pin curls?

A. I had a bandana on my hair and my hair wasn't pinned up.

Q. I will ask you whether or not on Tuesday after Mrs. Heller came home you didn't leave in a taxi and go downtown by yourself?

Mr. Guterson: I will object. She wasn't there on a Tuesday.

By Mr. Kosher:

Q. (Continuing): Wednesday, I mean. Excuse me. [66] A. No, I didn't.

Q. You are positive of that?

A. (Witness nodded in the affirmative.)

Q. I will ask you whether or not you know two gentlemen by the name of Baker, whose last names are Baker. A. Baker?

Q. Yes. A. Yes, I met Baker.

Q. Where did you meet Baker?

A. Well, I met him at the Stewart Hotel. Vicky, and I don't remember who, drove the car, took me to the Stewart Hotel, and she told me what he looked like and she wanted me to go in and meet this guy and bring him out to the house. They wanted to get him in the dice game.

Q. As a matter of fact, you did go down to the Stewart Hotel and got two men by the name of Baker, isn't that right?

A. There was another guy with him.

(Testimony of Rose Drucilla West Dill.)

Q. When was that? Do you remember when you met these two fellows? Was that on Wednesday?

A. I don't remember. That was Wednesday or Thursday.

Q. Could it have been on Wednesday? [67]

A. I don't know for sure just which night it was.

Q. You don't remember then, do you?

A. Which night it was.

Q. But you do remember you met these two men; did you come out to the house in a taxi with these two men? A. Yes, sir.

Q. And what time was it?

A. It was after midnight.

Q. Now, what was your condition at that time; were you sober or were you intoxicated?

A. No, I wasn't. I had been drinking but I wasn't that drunk. I wasn't intoxicated.

Q. Isn't it a fact when you came out to the house with those two men that Mrs. Heller remonstrated with you about bringing strange men out to the house?

A. No, sir. She knew this fellow and told me, and described him to me, and I went down there, and wanted me to bring him out and we couldn't get all the way in the cab and she sent another guy over by 'phone to show us the direction to the house because I didn't know just how to get there. [68]

Q. Now, how long did these men stay out to the house after you brought them out there?

A. The Baker—the one I knew by his name—

(Testimony of Rose Drucilla West Dill.)

he kept the cab driver there and he left earlier. I don't know what time the other guy left. He was talking to Vicky.

Q. Now, isn't it a fact you wanted to go back downtown with them in their cab? A. No.

Q. Isn't it a fact that the man Baker wouldn't let you go back with him because he said you were too drunk and too out of line to go anyplace?

A. I wasn't going to go back downtown.

Q. That isn't true? A. No.

Q. Now, calling your attention to the time that you left Mrs. Heller's house and went out through the patio, do you remember the evening preceding that incident; do you remember what happened there that evening?

A. You mean the night before?

Q. Yes, the time before you left through the patio.

A. I left there on a Saturday morning.

Q. You left on a Saturday morning; calling [69] your attention to Friday afternoon and Friday evening, do you remember what happened during that interval?

A. That Friday afternoon was the afternoon we all went downtown, Teddy and Vicky.

Q. Where did you go downtown?

A. To a bar, but I don't remember the name of it.

Q. Had you been drinking before you went downtown from the house?

(Testimony of Rose Drucilla West Dill.)

A. We had had drinks before we left the house, before we went downtown.

Q. Did you have any drinks downtown?

A. Yes, sir, we all had drinks downtown.

Q. I am not asking about "we all"; did you?

A. Yes, sir.

Q. How many drinks did you have downtown?

A. We had about three drinks there in the bar is all we had.

Q. How many drinks did you have out at the house?

A. I don't know how many; not too many.

Q. By the way, when you came up from Los Banos did you bring any liquor with you?

A. No, I didn't. [70]

Q. Are you sure you didn't bring a bottle in your bag? A. No, I didn't.

Q. Now, did you have——

The Court (Interposing): I think it is recess time. It is a little late. [71]

* * * * *

(Whereupon, the jury was returned to the court room.)

The Court: You may be seated.

It is stipulated that the jury and the defendants are present in the court room?

Mr. Kosher: So stipulated.

Mr. Guterson: Yes, your Honor.

The Court: You may proceed, Mr. Kosher.

Mr. Kosher: Your Honor, may we have the last question and answer read?

(Testimony of Rose Drucilla West Dill.)

The Court: Yes; the Reporter will read that.

(Whereupon, the following was read by the reporter: "Q. By the way, when you came up from Los Banos, did you bring any liquor with you?

"A. No, I didn't.

"Q. Are you sure you didn't bring a bottle in your bag?

"A. No, I didn't. [75]

"Q. Now, did you have——")

By Mr. Kosher:

Q. (Continuing): Now, did you have anything to drink at the airport prior to the time you called this telephone number, Adams 5680?

A. No, sir.

Q. You did not; now, going back to this money that you got down in California, do you remember what day of the week that was you picked up the money? A. The seventh of April.

Q. How do you know it was the seventh?

A. Because that—it was on a Thursday before Good Friday.

Q. It was on a Thursday before Friday?

A. Good Friday.

Q. And that is how you fixed the time as the seventh?

A. Well, I remember the date I picked it up; the date.

Q. Now, you didn't leave California until the 12th, was it?

(Testimony of Rose Drucilla West Dill.)

A. The 12th or 13th; it was on Tuesday night of the 12th.

Q. You left Tuesday night the 12th; can [76] you tell us why it was you didn't leave on the day you got the money?

A. That week end was Easter and I didn't want to leave Easter Sunday, before Easter Sunday was over, and I didn't leave until the next week.

Q. You say you knew Mr. Berg for a period of five or six years, is that correct?

A. Yes, sir; four, around '49.

Q. Since '49; did you and he talk about getting married? A. No, sir.

Q. Never did talk about getting married?

A. No, sir.

Q. I will ask you whether or not you told anybody up here after you arrived in Seattle that your purpose in coming up here was to marry Mr. Berg?

A. No.

Q. Now, do you recall having a talk with a judge by the name of Burns after you left Mrs. Heller's home?

A. I had called to see about my clothes, to see if I could get my clothes, and I talked to him over there on Mercer Island.

Q. Did you tell him you came up here for [77] the purpose of getting married? A. No, sir.

Q. I beg your pardon?

A. I told him I wanted my clothes and I was over there and had trouble and all I wanted to do

(Testimony of Rose Drucilla West Dill.)

was to get my clothes and they wouldn't let me have my clothes.

Q. And you didn't say anything at all about getting married? A. No.

Q. Do you remember talking to Mr. Berg's mother just before you left Los Banos?

A. Yes, sir, I talked to her just before I left.

Q. And I will ask you whether or not you told her that you were leaving to come up and marry her son, or marry Teddy?

A. I told her I was leaving to come to see Teddy. I didn't say I was coming to get married.

Q. You told her you were going up to see Teddy, is that right; you didn't tell her you were coming up here to practice prostitution, did you?

A. No, sir.

Q. Now, when you got this money, what did you do with it? [78]

A. I gave fifteen dollars to the lady that had my little girl and then I bought the people that drove me to the airport—I filled up his car. I think it was—I forget what the charge was—close to five dollars; and then thirty-four dollars for my ticket and then I had five or six dollars when I got here, and I paid the cab when they took me to the house.

Q. Now, do you remember telling Mr. Berg that you didn't pick up this money order?

A. No, sir.

Q. And you remember also telling him that you had spent the money to pay some bills with and that was the reason you didn't leave on the seventh?

(Testimony of Rose Drucilla West Dill.)

A. No, I didn't.

Q. You don't remember that at all? Do you remember telling Mr. Berg you had gotten drunk and had spent a good deal of this money and you barely had enough money left to pay these bills with?

A. No, sir, I didn't tell him that.

Q. I will ask you whether or not you had done any drinking from the seventh until the twelfth?

A. From the seventh to—on Saturday before I had been home that week end and never even [79] went out.

Q. What about Saturday; what did you do then?

A. I was in town Saturday and I probably had a couple. I would have stopped in Ricky's for one beer early in the afternoon but that was all.

Q. Didn't have anything else? A. No.

Q. And it was your testimony you didn't tell Mr. Berg after you got in Seattle that you had gotten drunk and spent the money he sent you and that you barely had enough to pay these bills; you didn't tell him that at all? A. No, I didn't.

Q. Did you tell him you had borrowed enough money to buy a plane ticket from a man by the name of Thomas? A. No, sir.

Q. Do you know anybody by the name of Thomas in Los Banos?

A. Yes, sir, I know most everyone that lives there.

Q. Do you have some friends down there by the name of Thomas? A. I know them. [80]

Q. Did you borrow any money from them?

(Testimony of Rose Drucilla West Dill.)

A. No, sir.

Q. You are sure of that? A. Yes, sir.

The Court: Do you want to interrupt now?

Mr. Kosher: Pardon?

The Court: Is it convenient to interrupt now for a moment?

Mr. Kosher: Yes.

The Court: All right.

(Whereupon, there was a brief pause in the within-entitled and numbered cause during which time the court considered other matters and the following proceedings were then had, to-wit:)

By Mr. Kosher:

Q. All right now, Mrs. West, you say that on your first day at the home of Victoria Heller that you committed one act of prostitution. Can you remember about what time of the day it was, or the night?

A. I don't remember just what time it was.

Q. Well, was it in the day time or in the evening? A. It was—— [81]

The Court (Interposing): What date is this again?

A. (Continuing): ——in the day time; in the day time.

By Mr. Kosher:

Q. In the day time; what day was it?

A. That was on Wednesday.

Q. That was on Wednesday; and the next day

(Testimony of Rose Drucilla West Dill.)

you say you had two customers, two additional customers?

A. Yes, sir.

Q. And what time did those customers come?

A. One was in the morning and the other one was—they was both after midnight in the morning.

Q. Sometime in the morning?

A. One of them was about three or four o'clock in the morning; in that time there.

Q. Three or four Thursday morning?

A. I don't remember just the time, what time it was.

Q. And what time was the other one?

A. It was in the morning too, not much difference in the time of the two.

Q. Just a short time after three or four in the morning? [82]

A. Yes.

Q. Now, who was in the house when you had the first customer?

A. When I had the first customer?

Q. Yes. A. Vicky and Teddy.

Q. And who was in the house when you had the second and third customer; that was the next day on Thursday?

A. Vicky and Teddy.

Q. They were both there at all times?

A. Yes, sir.

Q. So that you didn't have any customers at all on Friday; is that right?

A. No.

Q. And you didn't have any customers on Saturday; is that right?

A. No, sir.

Q. And you didn't go downtown to any hotel to commit any act of prostitution?

(Testimony of Rose Drucilla West Dill.)

A. I didn't go in no hotel and do no prostitution, no.

Q. And it is your testimony that all these acts of prostitution took place out at this house on Mercer Island; is that right? [83]

A. Yes, sir.

Q. There are two children living in that house; is that right?

A. Yes, sir.

Q. How old are those children?

A. One is eight and the other is eleven or twelve.

Q. And both of these youngsters went to school, is that right?

A. Yes, sir.

Q. And they slept in the house with their mother, is that right?

A. Yes, sir.

Q. And where were the children when these alleged acts of prostitution were taking place?

A. They were back in their bedrooms sleeping.

Q. Now, had you ever gotten any money from Mr. Berg prior to this time?

A. (Witness nodded in the negative.)

Q. He had never given you a penny before, is that right?

A. No, sir, never.

The Court: You will have to speak up.

The Witness: I said, "no, sir." [84]

By Mr. Kosher:

Q. Had you ever given him any money?

A. No, sir.

Q. And it is your testimony, is it, that he just called you up and told you to come up here and sent you this money and you came up on it; is that right?

A. Yes, sir.

(Testimony of Rose Drucilla West Dill.)

Q. You had no purpose in coming up here except to practice prostitution; is that right?

A. That is what I was coming for.

Q. You didn't know Mrs. Heller at that time, did you?

A. No, I didn't know her except when I talked to her over the 'phone.

Q. And you just knew Mr. Berg casually; is that your testimony? A. Well, I knew him.

Q. And was there any relationship between you and he other than just being good friends?

A. No.

Q. Had you ever slept with him down in California? A. Yes, I had at one time.

Q. Just one time? [85]

A. No, I have been with him several times at home.

Q. Did he ever tell you that he loved you and wanted to marry you? A. No, sir.

Q. Did you ever tell him you loved him and wanted to marry him? A. No, sir.

Q. Never did? A. No, sir.

Q. Never told anybody up here when you came up here you came up here to get married?

A. To marry Teddy? No, sir, I didn't.

Q. Did not say anything like that? You call him Teddy, is that right? A. Yes.

Q. As a matter of fact, everybody else calls him Ted?

A. A lot of people call him Ted or Teddy.

Q. How long had you known his mother?

(Testimony of Rose Drucilla West Dill.)

A. Well, I knew of her when I saw her not too long after I met Teddy and I used to see her, and I don't remember just when I met her, the time I first met her.

Q. Had you made any arrangements with her [86] to bring you to the airport?

A. He had told me to ask his mother to bring me up and I called her and she couldn't make the trip by herself to the airport; so he said he had called his mother and she said she couldn't make it.

Q. But you got these other three men to take you to the airport, is that correct?

A. I got this man and this other fellow and his wife.

Q. You got two men and a woman to take you to the airport; is that correct? A. Yes, sir.

Q. Now, with reference to the time you left the house of Mrs. Heller, do you remember about what time it was? That is, the last time you left the house. What time was it?

A. When I went over to the neighbors you mean?

Q. Yes.

A. It was in the morning, between maybe nine or ten, or a little after ten. I don't know just what time.

Q. Between nine and ten in the morning?

A. I don't know just what time it was, but [87] it was in the middle of the morning.

Q. Were you sober at that time?

(Testimony of Rose Drucilla West Dill.)

Mr. Guterson: Can we have what day this is, your Honor?

Mr. Kosher: Yes.

By Mr. Kosher:

Q. (Continuing): What day was it you left Mrs. Heller's home the last time?

A. That was Saturday.

Q. About ten o'clock in the morning?

A. In the middle of the morning.

Q. Were you sober at that time?

A. We had been drinking that morning in there.

Q. Does liquor affect you at all? A. No.

Q. Then it is your testimony that you were not intoxicated, is that correct?

A. I wasn't really intoxicated.

Q. Had you been intoxicated that night?

A. No, sir.

Q. Not at all; and you say you had some sort of a commotion in the house before you left?

A. Yes.

Q. What was that commotion over? [88]

A. It was over the money; about some one of the fellows' money there.

Q. I will ask you whether or not you did not in fact steal some seaman's wallet and take some fifty dollar bills out of that wallet?

A. No, sir.

Q. And isn't it also a fact that they compelled you to deliver up this money that you had taken?

A. I never understood you.

(Testimony of Rose Drucilla West Dill.)

The Court: You say you don't understand the question?

The Witness: I don't understand.

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. And isn't it also a fact that they compelled you to deliver up this money that you had taken?")

A. (Continuing): Well, they tried. That is when they were abusing me and kicking me around and everything and trying to make me give them the money, and I didn't have any money. [89]

By Mr. Kosher:

Q. I will ask you if you spit out of your mouth three fifty dollar bills? A. No, sir.

Q. Who was in the house when you had this commotion at the time you say you were abused?

A. There were three—five people there.

Q. Who were they?

A. Six, and a girl there.

Q. All right, who were these people? Do you recognize any of them here in the court room?

A. Yes, sir.

Q. Who do you recognize?

A. I recognize four of them.

Q. All right, will you point them out to us, please?

A. The fellow with the glasses, and one sitting by him in the jacket, and one in the blue suit, and one in the back with the short hair and with the light blue suit.

(Testimony of Rose Drucilla West Dill.)

Q. So that the record will be straight, it is your testimony that you did not spit three fifty-dollar bills out of your mouth in the presence of these four people? A. No, sir. [90]

The Court: Speak up.

A. (Continuing): No, sir, I didn't have no money in my mouth.

By Mr. Kosher:

Q. Well, did you take any money from anybody that night?

A. I didn't take any of that money. That is what the trouble started over when they started after me.

Q. At any rate, you left this house and you went to the neighbors, is that correct? A. Yes, sir.

Q. And then later you contacted the police department, is that right?

A. I called to see about getting my clothes and then when they started questioning me I told them where I was and then I started telling them.

Q. Now, with reference to this justice of the peace, did you just talk to him on the telephone or did you go and see him personally?

A. The justice of the peace here?

Q. Yes.

A. They took me from the hotel down to the office at the city building.

Q. Did you talk to the judge down there—justice of the peace? [91]

A. I guess that was him I talked to; the chief

(Testimony of Rose Drucilla West Dill.)

it was supposed to have been. I don't know who they were.

Q. Did you talk to a man by the name of Judge Burns?

A. That is the guy I had called on the 'phone to see about getting my clothes.

Q. Did you ever meet him personally?

A. I didn't meet him down at the building that I know of. I don't remember meeting him down at the city building after they took me down there.

Q. After you left the Heller home and went down to the hotel, did you have anything to drink there?

A. I ordered a beer.

Q. Where did you get the money to buy the beer?

A. I had—Mrs. Keating gave me money, the neighbor, when she took me down to the hotel she gave me money.

Q. How much money did she give you?

A. Twenty dollars.

Q. And that is all the money you had?

A. Well, I had just some loose change in my [92] pocket, a dollar and a half or a couple of dollars.

Q. And you bought some beer and had it sent up to the room?

A. They brought me a beer up to the room.

Q. And that is all you had to drink then?

A. Yes, sir.

Q. Now, did you practice any prostitution down at the Stewart Hotel?

(Testimony of Rose Drucilla West Dill.)

A. No, sir; I was only there a little while and when I called in and registered they said, "Where is your luggage?"; and I said it would be in later, and then when I called about my clothes the manager told me, "Since your luggage hasn't come, you better check out."; and I didn't know where to go and I walked down to the Washington Hotel and I called Mrs. Keating back.

Q. Isn't it a fact that the manager ousted you because you were drunk and disorderly?

A. I wasn't drunk and disorderly. The only thing is I made those two 'phone calls. I walked right straight up to the room and I wasn't even in the hotel; I was right in the room all the time I was there.

Q. But he did ask you to leave the hotel, is that right?

A. He said, "Since your luggage isn't here, you better [93] check out." and I didn't say a word.

Q. No other conversation with the man at all, is that right? A. No.

Q. Now, were you ever alone in this house on Mercer Island during those three days when Mrs. Heller and Mr. Berg were not present?

A. When they went downtown together when they were talking about buying that car, I was there.

Q. What day was that?

A. They went downtown Thursday. The three days I was there and stayed, they were downtown. She was going and seeing about buying that car.

(Testimony of Rose Drucilla West Dill.)

Q. I didn't get your last answer.

A. I said, most of the three days I was there they was downtown because she was trying to buy that car.

Q. Did she go downtown Wednesday, do you remember? That was the first day you got there?

A. Yes, she went down that day.

Q. About what time did she leave, do you know?

A. I don't know what time it was when she left.

Q. Was it shortly after you arrived there?

A. No, it was quite a while after I arrived.

Q. How much afterwards?

A. I don't know just how much.

Q. Was it more than one hour after you arrived?

A. It was in the day; it was up in the day.

Q. Sometime after in the day; was it after noon or before noon?

A. I don't remember just whether it was around noon or what time it was when she left.

Q. Was it around noon that she left?

A. Probably around noon.

Q. Around noon? A. I don't know.

Q. And what time did she get back on Wednesday, do you remember that?

A. I don't know just what time she got back; I don't know just what time she got back.

Q. Was it late in the evening?

A. It was later on in the evening or afternoon.

Q. Now, did you have dinner at that house Wednesday? [95]

(Testimony of Rose Drucilla West Dill.)

A. Yes, we fixed something there to eat. I don't remember what we fixed.

Q. Who is the "we"?

A. Teddy was still there and he was cooking some stew or opened a can of stew.

Q. Was that Wednesday?

A. I think that was Wednesday.

Q. Now, I thought you just told me that Mrs. Heller and Ted went downtown and that you didn't remember when they got back but that it was late in the evening; is that right? Is that what you said?

A. I don't know just what time she got back but it was that day we fixed stew, that afternoon.

Q. That afternoon?

A. It was in the afternoon sometime, Wednesday.

Q. Now, what about on Thursday, did she go downtown Thursday? That would be the second day you were there.

A. She went downtown every day I was there but I don't know what time she went down.

Q. Do you remember what time she went on Thursday? A. No.

Q. Was it in the morning or afternoon? [96]

A. It was always I think around noon when she went.

Q. Around noon?

A. I don't know what time she went down.

Q. What time did she get back Thursday?

A. Between seven and nine o'clock, I guess;

(Testimony of Rose Drucilla West Dill.)

something like that. I don't remember just what time she got back.

Q. Between seven and nine o'clock?

A. I guess it was in that time. I don't remember just what time it was.

Q. Well now, so that we will understand what is happening here, as I understand you, you came in on a Wednesday morning, is that right?

A. Yes, sir.

Q. And Wednesday about noon or thereabouts Mrs. Heller went downtown with Ted?

A. They went sometime that day. It was always around noon when she left.

Q. Let me ask you this: Do you remember for sure every day you were there she went downtown?

A. I think every day I was there she was downtown.

Q. And it is your best recollection she left [97] at noon and didn't get back until seven or nine o'clock each evening, is that right?

A. Except that Friday that I went down with them.

Q. Except the Friday you went down with them, and you are sure that on Wednesday, the first day you got there, she went downtown?

A. Yes, she went downtown that day.

Q. And did Ted go out the first day?

A. The first day? I don't know or remember for sure whether he went with her that day when she left at noon or not.

Q. What about on Thursday?

(Testimony of Rose Drucilla West Dill.)

A. On Thursday?

Q. That would be the second day you were there.

A. I don't know where he went with her that day. One day he went out to the ship. I don't remember just how they did go downtown.

Q. You do know that Mrs. Heller left on Thursday, is that right? A. Yes.

Q. And you are sure she left about noon or thereabouts; somewhere around noon and that she was gone until seven or nine o'clock in the evening; [98] is that right?

A. As best I remember.

Q. Now, what about Friday; do you remember whether she went downtown Friday?

A. Yes, sir, we all went down on Friday.

Q. All of you went down?

A. Teddy, Vicky and I went down.

Q. Now, sometime ago you testified you went out to the hotel and picked up a man by the name of Baker; what date was that, Mrs. West?

A. Maybe that was Thursday night after midnight. It was after midnight; it was in the morning, after midnight Thursday night.

Q. Thursday night?

A. I think it was after midnight Thursday night.

Q. What time did you go downtown Thursday?

A. Vicky took me down there. She had called and had me call, gave me the number and they took me down to the hotel and they walked in the lobby and I went in the bar and they sat down and when

(Testimony of Rose Drucilla West Dill.)

the guy left they took off and they told me to bring him out to the house.

Q. What time was that?

A. It was around one o'clock, I guess; about [99] one, something like that.

Q. One o'clock in the morning?

A. Something like that.

Q. You went down about twelve, is that right; about midnight?

A. It was a little after midnight because I know it was pretty close.

Q. How did you get downtown?

A. Vicky took me down.

Q. In what car?

A. I don't know whether it was her car or there was some other fellow driving the car.

Q. Who was the other fellow?

A. I don't know who was driving the car.

Q. What kind of a looking man was he?

A. I don't remember who drove the car down there.

Q. As a matter of fact, you knew she didn't have a car at that time; isn't that a fact?

A. Well, she was trying to buy a car at that time. She didn't have a car when I got there.

Q. Was Ted with her at that time?

A. When she took me downtown?

Q. When you and she went downtown?

A. They took me down to the hotel where [100] this guy was at.

Q. You say some unnamed man drove a certain

(Testimony of Rose Drucilla West Dill.)

kind of car, and you don't know what kind of car it was, and you drove down after midnight; and you got back at what time?

A. It must have been about three, because we had a hard time getting back. The cab driver couldn't find the place.

Q. And that was about three o'clock; is that right? A. About that time.

Q. And what did you do after you got home?

A. We were all sitting in the living room and having drinks and they were playing dice.

Q. You testified a little while ago on that date between two or three in the morning that you turned two tricks. What about that now?

Mr. Guterson: Will you give her the date you are referring to?

Mr. Kosher: Yes. Thursday.

Mr. Guterson: You were talking about Friday.

Mr. Kosher: Thursday.

Mr. Guterson: Early Thursday morning or early Friday morning? [101]

Mr. Kosher: Early Thursday morning.

The Court: Let the witness answer the question.

A. I have got mixed up on the dates then because I don't know just what date that was.

By Mr. Kosher:

Q. Well, are you sure; are you sure of anything that you have testified to here?

A. Well, what I said there, but I got mixed up on the dates.

Q. What dates did you get mixed up on?

(Testimony of Rose Drucilla West Dill.)

Wednesday or Thursday, it was one one day and two the next day? Did you have one man the first day you were there and two men the following day?

A. The first day I was there I had one and then two the next day.

Q. Then it is your testimony that you had one man Wednesday afternoon and two Thursday morning, and you had no men at the house Friday or Saturday, is that right?

A. I didn't have no intercourse Friday or Saturday there.

Q. Friday or Saturday; what do you do for a living at the present time?

A. Right now I am just staying at home. My husband is working. He is a carpenter. I just got married the thirteenth of last month.

Q. Thursday?

A. Thirteenth, after I got home.

Q. What did you do from the time you left Seattle until the time you came back up here for the trial; did you work anyplace?

A. No, sir; I was living on the ranch and when I got married I was living with my mother- and father-in-law. [105]

Q. Now, have you testified to a number of conversations you had with Mrs. Heller? Did you have any other conversations with her? Did you talk to her again after you called her on the telephone and asked for your clothes?

A. Any others?

Q. Yes.

(Testimony of Rose Drucilla West Dill.)

A. Just when she called yesterday afternoon over at the hotel is all.

Q. Now, getting to that: You came up here from Los Banos for this trial? A. Yes, sir.

Q. Did you tell anybody you were coming for the trial? A. For the trial?

Q. Yes.

A. In Los Banos everybody knows it, I guess.

Q. Did you notify Mrs. Heller you were coming up here to testify? A. No, sir.

Q. As a matter of fact, didn't you call her house and tell her to call you at the hotel?

A. No, sir, I didn't.

Q. Did she call you at the hotel? [106]

A. She called me yesterday afternoon.

Q. You didn't tell her you were staying at the Olympic Hotel, did you?

A. I didn't know how she knew and I didn't ask her.

Q. You didn't ask her, is that right?

A. No, I didn't. She called up and I recognized her voice and she said, "This is Vicky."; and I didn't ask her how she knew I was there. I didn't know how she knew I was there.

Mr. Kosher: I think that is all. Let me ask one more question. Well, you can proceed.

The Court: Mr. Volinn, are you going ahead?

Mr. Volinn: Yes, I am going ahead with my cross examination. If the Court please, I would like to stand, if I may. It is rather difficult for me to see the witness.

(Testimony of Rose Drucilla West Dill.)

The Court: You may stand there if you wish.

Mr. Volinn: Thank you, Your Honor.

Cross Examination

By Mr. Volinn:

Q. Now, Mrs. Dill, how many times have you been married? [107] A. Twice.

Q. And what was the name of your first husband? A. What?

Q. What was the name of your first husband?

A. Frank Sanchez.

Q. Frank what?

A. S-a-n-c-h-e-z (spelling).

Q. Didn't you go by that name?

A. By that name?

Q. Yes.

A. No, sir, I went by my maiden name.

Q. Didn't you have that name also; didn't anybody call you by that name, "Mrs. Sanchez"?

A. By that name?

Q. Yes.

A. Well, I guess they did at the time.

Q. How long were you married?

A. I wasn't married very long. I left right after I—about three months after.

Q. Well, anyway, you had that name, did you, in addition to Dolly Wilson and Virginia Wilson?

A. Yes, sir, but that was my married name at the time I was married.

Q. And that was Sanchez, you say? [108]

A. Yes.

(Testimony of Rose Drucilla West Dill.)

Q. And where did that marriage take place, and when? A. I was married in Mexico.

Q. Was that gentleman a Mexican?

A. He was Spanish-Mexican.

Q. And when was it?

A. That was back—I left him in—I have had my divorce from him since 1952, or 1950, or something like that.

Q. '50 or '52? A. '52, I think it is.

Q. And then you married again?

A. I married again the thirteenth after I left here.

Q. Mr. Dill is your second husband?

A. Yes.

Q. Now, you have a child. How old is the child?

A. She is three and a half.

Q. And whose child is she?

Mr. Guterson: I will object, your Honor. This is completely immaterial.

The Court: I see no reason for the question. Objection sustained. [109]

Mr. Volinn: All right.

By Mr. Volinn:

Q. (Continuing): Now, did you ever use any other names besides Mrs. Sanchez, and West, and Dolly Wilson and Virginia Wilson?

A. No, sir.

Q. Did you ever go to any hotels with any men with whom you were going to engage in an act of prostitution?

A. Did I ever go to any hotels?

(Testimony of Rose Drucilla West Dill.)

A. Yes. You never engaged in an act of prostitution in a hotel? A. No, sir.

Q. Or a motel? Didn't you testify you were a prostitute?

A. Yes, but at the time this was like a rooming house, a place where we was working.

Q. Was that San Francisco?

A. No, that was——

The Court (Interposing): Some of this cross examination seems to me to be afieid. What is the purpose of it?

Mr. Volinn: My purpose is to show that the witness's testimony is contradictory. She testified before that the only names she had been going [110] under——

The Court: That is one thing, but asking about going to motels and hotels——

Mr. Volinn (Interposing): It is preliminary, your Honor.

The Court: On your assurance it is, you may proceed.

By Mr. Volinn:

Q. Well, where did you commit your acts of prostitution in San Francisco?

A. At the time there I was at a hotel with a lady that lived there; I lived right there. I was living there by myself.

Q. And what name did you go under there?

A. That was Dolly. At the time I was working as a prostitute I always used Dolly Wilson.

(Testimony of Rose Drucilla West Dill.)

Q. And then you never engaged in an act of prostitution in some other hotel?

Mr. Guterson: I will object, your Honor.

The Court: Objection sustained. I don't quite see what the purpose is.

Mr. Volinn: Well, all right.

The Court: If you state what the purpose is.

Mr. Volinn: Well, my purpose actually, your Honor, is: If it could be shown she went to hotels with other men then presumably she would register under——

The Court (Interposing): Do you have some testimony that she has registered under some other names?

Mr. Volinn: Not at the present time.

The Court: Then until such time as you have something of that character, I suggest you proceed to other matters.

Mr. Volinn: All right.

By Mr. Volinn:

Q. (Continuing): Now, you have been — you practiced prostitution, from your testimony, from 1946 to approximately 1952?

A. It was around '50, a little after '50.

Q. Until '50? A. About '52.

Q. Was it '50 or was it '52?

A. It was about—between—about the end of '51, I guess it was.

Q. And you never engaged in any acts of prostitution between that date and until you came to Seattle? [112] A. No, sir.

(Testimony of Rose Drucilla West Dill.)

Q. Not at all? How did you make a living during that time?

Mr. Guterson: I will object, your Honor. He can ask her what jobs she had.

The Court: I will overrule the objection. She stated what her activities were. I think the question is proper.

Mr. Guterson: Yes.

By Mr. Volinn:

Q. (Continuing): What did you work at from '52?

A. I worked in a restaurant in Los Banos until I was seven months pregnant with the baby and then I stayed in San Francisco until she was born and then I left there and my husband and lived with this family in Los Banos.

Q. You say your husband came back?

A. When I left San Francisco and left him I came back to Los Banos.

Q. I see.

A. And then moved out on the ranch with this Portuguese family that always kept my baby for me when I was out there.

Q. Now, during the period of time you were [113] a prostitute you had—did you gain any impression as to places where houses of prostitution were located, what kind of buildings they were in, or what kind of neighborhoods they were in?

Mr. Guterson: I will object, your Honor.

The Court: Objection sustained.

(Testimony of Rose Drucilla West Dill.)

By Mr. Volinn:

Q. (Continuing): When you—in your experience as a prostitute, were houses of prostitution ever located in a good residential district of one-family houses?

Mr. Guterson: I will object to that.

The Court: Objection sustained. That isn't the issue here. Get on to something material.

Mr. Volinn: It is preliminary, your Honor.

The Court: It seems to me everything is preliminary. Go ahead and meet the issue.

By Mr. Volinn:

Q. (Continuing): Now, when Berg called you up, do you remember the date, the last telephone call he made?

Mr. Guterson: Just a moment. Are you talking about the first call or the last call? [114]

Mr. Volinn: I am asking her about the first of the series of calls which Berg was supposed to have made down at Los Banos relating to inviting her to Seattle.

A. The first call was on a Sunday morning.

Q. (By Mr. Volinn): And did the long distance operator tell you it was a call from Seattle?

A. When I answered the phone they just put the call right straight through and just said, "Seattle is calling. Is this 2404?"; and I said, "Yes, Ma'am."; and she said, "Go ahead."; and I started talking to him on the 'phone.

Q. Did Berg say that you were to come up to Seattle to practice prostitution; did he use that language?

(Testimony of Rose Drucilla West Dill.)

A. Well, he said he had came back and just——

The Court: The question is: Did he use that language?

By Mr. Volinn:

Q. Did he use that language; did he ask you to come up here to be a prostitute; is that what he said?

A. He didn't use the word prostitute, but to [115] do the work.

Q. Did it occur to you——

Mr. Guterson: Just a minute. Can the witness complete her answer? Had you finished?

A. He didn't just exactly use the word "prostitute" but he was talking to me when he was home and was telling me about the place, is all.

Mr. Volinn: Wait a minute.

The Court: Just a minute.

Mr. Volinn: I object.

The Court: The answer we want here is the conversation at the time; not what you might have understood him to mean, but what he said. If you can't remember the words or the substance of what he said, you can't go on and give your impression.

If you will, restate your question, Mr. Volinn; and bear that in mind.

Mr. Volinn: Would you read the question?

The Court: The Reporter will read the question.

(Whereupon, the following was read by the reporter: [116] "Q. Did he use that language; did he ask you to come up here to be a prostitute; is that what he said?")

(Testimony of Rose Drucilla West Dill.)

A. (Continuing): He said when he called, he told me, he had came back and checked on the place and everything, and as far as the law and everything, and everything was O. K., I had nothing to worry about, and then if I didn't like it I could go back.

By Mr. Volinn:

Q. Isn't it a fact he told you you could come up here to work when he was talking to you on the 'phone on this particular occasion; didn't he tell you you could come up here and work?

A. He said "work" but he knew I knew what the place was because he told me what the place was. Her house, he told me about it.

Q. He told you about a place, did he?

A. Yes, sir.

Q. What place did he tell you about?

A. He told me about Vicky's place. He told me it was her house and I stayed right there.

Q. What right there?

A. It was her home and I stayed right at the house and she had the friends and the tricks came [117] right there. That is how he explained it to me.

Q. Did he ever mention to you that you could work at a night club, the 908 Club, as a waitress?

A. No, sir, we didn't talk about it.

Q. Did he ever mention the 908 Club to you at all?

A. 908?

Q. Is this the first time you have heard of the 908 Club?

A. The first time I have heard of it?

(Testimony of Rose Drucilla West Dill.)

Q. Yes, the first time you have heard of it.

A. The first time I have heard of it.

Q. Now, you testified that there were about three or four telephone calls afterwards; is that correct?

A. Yes, sir.

Q. And on any of those particular calls did he actually say that you were to come up here to be a prostitute?

A. He didn't say the word "prostitute" on the 'phone.

Q. All right; did he on the 'phone use any language showing that—stating that you were to come up here to work as a prostitute? [118]

A. Well, the only time—at one time he said, "If you could get here tomorrow, they have a fellow there in the house and they would try to hold him." And that is the only time he said anything, but he never used those words on the 'phone.

Q. Which telephone call was that, the first or the second or the third or fourth?

A. That was on the second one.

Q. Now, you testified that you had received sixty dollars from Berg on the seventh; is that right?

A. Yes, sir.

Q. You didn't buy your airline ticket until the twelfth; is that right?

A. I bought it the night I came up.

Q. Did you owe any money in Los Banos?

A. Yes, sir, I did.

Q. Who did you owe money to?

A. I owed the Kamp's store.

(Testimony of Rose Drucilla West Dill.)

Q. What kind of a store is that?

A. A men and ladies' store, Kamp's.

Q. How much did you owe them?

A. I think I owed them twenty-two dollars.

Q. And who else did you owe money to?

A. And then I owed Pearl's Dress Shop. [119]

Q. How much did you owe them?

A. Ten dollars.

Q. Who else?

A. And then my rent would have been due the twenty-eighth of that month. It wasn't due then.

Q. Did you pay your rent?

A. And I still had my electric bill and 'phone bill, but they hadn't come in yet when I left.

Q. You mean you only owed thirty-two dollars?

A. Then I owed my doctor bill but I don't know what I owed my doctor.

Q. How much money did you have in your possession when you received the sixty dollars?

A. I didn't have any money.

Q. You had no money at all?

A. I had probably three or four dollars. I didn't have really any money.

Q. Then you used—you started to use that money to live on, didn't you? A. No, I didn't.

Q. You mean you only had three or four dollars and you didn't touch any of the sixty dollars?

A. No, sir.

Q. What did you do with it? [120]

A. I just saved it because if I hadn't come up I

(Testimony of Rose Drucilla West Dill.)

would have sent it back because I hadn't made up my mind whether I would come up or not.

Q. You didn't touch any part of it?

A. No, sir, I didn't.

Q. You didn't touch any part of it until the thirteenth? A. Until I started up.

Q. You mean you had the sixty dollars intact when you came to the airport to buy the airline ticket?

A. Yes, all but fifteen dollars that I had given just of that to a lady that had my baby, and then I brought those people and filled their car up just as we left the house.

Q. How much did you pay them?

A. I filled the car up with gas. It was right close to five dollars for the tank of gas.

Q. You spent twenty dollars out of the sixty dollars?

A. I don't remember what the change was.

Q. And you hadn't touched the sixty dollars all week? A. No, sir.

Q. And you hadn't used it to buy drinks or [121] anything? A. No, sir, I saved it.

Q. Did you put it in the bank?

A. No, just put it in a little box in the bed room where I put change in.

Q. Did you borrow any money that week from anybody?

A. Did I borrow any money? No, sir.

Q. You didn't borrow from a soul?

A. No.

(Testimony of Rose Drucilla West Dill.)

Q. Was anybody suing you for any bills down there? A. No.

The Court: The Court will sustain an objection. You are just trying to confuse the witness on things that haven't any bearing. Now, let's move along.

By Mr. Volinn:

Q. Now, you never planned on marrying Mr. Berg; that is your testimony, isn't it?

A. No, sir, we hadn't talked about marriage.

Q. At any time? A. No, sir.

Q. And when—you did go over to Mr. Berg's house though on a date? [122]

A. Call at his house?

Q. Yes.

A. Yes, sir, I have been to his mother's house.

Q. And you saw his mother?

A. Yes, I saw her.

Q. And step-father? A. Yes, sir.

Q. And they never led you to understand that they thought you were going to get married, did they? A. No, sir.

Mr. Guterson: I will object to what anybody understood.

The Court: Objection sustained.

By Mr. Volinn:

Q. Did they ever say to you that they expected you two to get married? A. No, sir.

The Court: Cross examination should be within the scope of direct examination. Some of this went in on cross examination before by Mr. Kosher. I will not permit cross examination on cross examination.

(Testimony of Rose Drucilla West Dill.)

Now, get back to the direct if you want to cross examine. [123]

Mr. Volinn: If I may respectfully state to the Court, I believe that——

(Whereupon, there was a brief pause.)

Mr. Volinn (Continuing): ——I am cross examining on behalf of the Defendant Berg. I realize it may be repetitious and I apologize for that.

The Court: I understand that, Mr. Volinn. I didn't mean to unduly restrict your cross examination, but cross examination on the part of Mr. Kosher on matters that may not have been objected to but not within the scope doesn't permit cross examination in Federal Court.

Mr. Volinn: Well, I would like to continue for a while longer, if I may.

By Mr. Volinn:

Q. Coming back to these men that you had acts of intercourse with, the three men; the first one, as I understand, that you had an act of intercourse with was Thursday afternoon or Wednesday afternoon?

A. It was Wednesday. I had the three men in the two days.

Q. Was the first one Wednesday afternoon?

Mr. Guterson: Your Honor, I think this [124] is repetitious.

The Court: This is on matters on direct examination. It may be repetitious but that is permissible.

Mr. Guterson: O. K.

(Testimony of Rose Drucilla West Dill.)

By Mr. Volinn:

Q. (Continuing): Was that Wednesday afternoon?

A. I had one the first day I got there and then two after midnight or in the next day. I had the three men in the two days there.

Q. Let me ask you this: About how old a man was the first one?

A. I don't know. He looked like he would be about thirty-five, I guess, or forty; something like that.

Q. And what type of complexion did he have?

A. He was a big fellow and red hair and dressed in a suit.

Q. Do you know his name? A. No, sir.

Q. You don't know the names of any of them?

A. No, sir, I don't remember the names.

Q. Did you introduce yourself to him?

A. No, sir; Vicky introduced me to him. [125]

Q. Did Vicky give you his name?

A. She told me his name but I don't remember.

Q. You don't remember?

A. I don't pay no attention to names.

Q. And the second man, about how old was the second one?

A. He was about the same age; about the same.

Q. Did you have—was he also introduced to you by Vicky?

A. Yes, sir. She introduced me to them. I don't remember what their names were, though. I never paid any attention.

(Testimony of Rose Drucilla West Dill.)

Q. Did Mr. Berg engage in any of these introductions?

A. You mean introduce me to any of the *buys*?

Q. Yes. A. No, sir.

Q. Was he around when they came in?

A. He was there but back in one of the bedrooms.

Q. And the third man, you don't remember anything about his name? A. I don't remember.

Q. So then you don't remember his looks in particular? A. No.

Mr. Volinn: I have no further questions.

Mr. Kosher: May I ask one more question, please?

Cross Examination

By Mr. Kosher:

Q. Do I understand you to say there is one house on one side of Mrs. Heller's house but on the other side there is no house?

A. As best I remember, when you drive in there is no house on the right but there is one on the left. I know Mrs. Keating's house was on the left as you go in.

Q. You were there about three days; did you go outside sometime?

A. I didn't go outside only a couple of times I was out in the front.

The Clerk: Defendant's Exhibit A-1 marked for identification.

(Defendant's Exhibit A-1 marked.)

(Testimony of Rose Drucilla West Dill.)

By Mr. Kosher:

Q. Showing you what has been marked for [127] identification as Defendant's Exhibit A-1, can you tell me what that is?

A. Yes, this is Vicky's house here.

Mr. Guterson: I didn't hear that.

By Mr. Kosher:

Q. Can you recognize that picture? You can answer that "yes" or "no". A. Yes.

Q. What is it?

A. That is Vicky's home there.

Q. What is on either side of it?

A. Well, I had never noticed this over here. We drove in here, but I know this house in here.

Mr. Kosher: We offer Defendant's Exhibit A-1.

Mr. Guterson: I have no objection.

The Court: Mr. Volinn, have you seen that?

Mr. Volinn: Yes, your Honor.

The Court: A-1 may be admitted.

(Defendant's Exhibit A-1 admitted.)

Mr. Guterson: Does that complete it?

Mr. Kosher: That is all.

The Court: Do you have redirect? [128]

Mr. Guterson: Just briefly.

Redirect Examination

By Mr. Guterson:

Q. On Saturday afternoon after you left Mrs. Heller's home you said you went to the hotel and spoke to her on the telephone; is that correct?

A. Yes, sir.

(Testimony of Rose Drucilla West Dill.)

Q. Did you recognize her voice on that occasion?

A. Yes, sir, I knew it was her voice when I heard it.

Q. The first time that you spoke on the 'phone to Mr. Berg on the early Sunday morning call when you were in Los Banos and received a call from him, did you also talk to someone on the 'phone besides Mr. Berg? A. I talked to Vicky.

Q. Did you recognize the voice you spoke to on that first Sunday morning as the same voice you spoke to on the Saturday afternoon after you left the Heller home?

A. Yes, sir, it was the same lady. I knew it was her.

Q. When you arrived at the airport on the early morning of April 13th and you called Adams [129] 5680—

A. (Interposing): Yes, sir.

Q. (Continuing): —did you also speak to a woman on that occasion?

A. Yes, sir, she answered the 'phone.

Q. Was that the same voice? A. Yes, sir.

Q. Did you recognize it?

A. Yes, sir, I knew her voice when I heard it.

Q. Now, redirecting your attention back to the early Sunday morning call, the first long distance call you received when you spoke to the woman whose voice you recognized from your later meeting with her, what conversation did you have with her?

A. The first time?

Q. The first call on that early Sunday morning;

(Testimony of Rose Drucilla West Dill.)

what conversation did you have with a lady named Vicky?

A. She talked to me and she said, "Are you going to come up? Teddy told me about you. Why don't you come on up?"

Q. What did you say?

A. I told her then I would. I said, O. K., I [130] would come up.

Q. Did you have any other conversation with her on that conversation?

A. Then she said I could stay at the house with her and I didn't have to stay downtown, or nothing. I could stay right there and I didn't have to worry about anything.

Q. Did you ever talk with this woman again on another of the long distance telephone calls from Seattle to Los Banos?

A. One time after that when Teddy called I talked to her.

Q. All right; what conversation did you have on that occasion?

A. She asked why I didn't come up.

Mr. Kosher: Just a minute. I object unless the time is fixed in the second conversation.

By Mr. Guterson:

Q. Do you remember how long after the first long distance call this was?

A. Until they called again?

Q. The second long distance call?

(Testimony of Rose Drucilla West Dill.)

A. It was a couple of days after the first one.

Q. And you were in Los Banos when you [131] received this call?

A. Yes, sir, at my number.

Q. Relate the conversation between you and Vicky on that occasion.

A. She wanted to know why I didn't come up and I said I didn't have the money and she said they would send me the money and, "If you don't have your clothes ready, just throw them in a suit case and you can straighten them out after you get here."

Q. After you arrived at the airport in Seattle Wednesday morning, the 13th of April, you spoke to Vicky again over the telephone from the airport?

A. Yes, sir.

Q. Will you tell us what conversation you had with Vicky on that occasion?

A. She told me they was going—they couldn't come to meet me because they didn't have a car and she said to get a cab and come to the house and she gave me the address but I couldn't remember the address and I didn't write it down and I called back again and she repeated the address to me again and I wrote it down so that I would know the address. I had the number but not the address.

Q. And then you did get a cab and go out to [132] the house?

A. Yes, sir.

Mr. Guterson: I have nothing further.

(Testimony of Rose Drucilla West Dill.)

Recross Examination

By Mr Kosher:

Q. Now, Miss West, on your first conversation that you claim you had with Mrs. Heller, she at no time told you she wanted you to come to Seattle for the purpose of practicing prostitution, did she?

A. She didn't use the words of that but she told me of her place and everything and said it was good money.

Q. What did she say exactly; what were her exact words on that first conversation? Can you tell me that?

A. I don't know whether I can tell exact words or not but in talking she said, "Why don't you come up and try it." She said everything was O. K. "You can stay at the house with me. It is good and you can stay right here. Come and give it a try."

Q. She just picked up the telephone and said, "Stay with me. Everything is all right and if you don't like it you——"

A. (Interposing): She said, "How are you? Teddy [133] was telling me about you."

Q. What else did she say?

A. Why didn't I come up.

Q. Did she say, "Why don't you come up?"

A. Yes; she said, "Why don't you come up here?"

Q. What did you say to that?

A. Then I told her O. K., I would come up.

Q. And what did she say?

(Testimony of Rose Drucilla West Dill.)

A. They told me the plane, if I leave on the plane they would meet me.

Q. When you say "they"—

A. (Interposing): Well, I had talked to both of them on the 'phone.

Q. Both at the same time?

A. On the same 'phone call.

Q. I am just interested in what Mrs. Heller is supposed to have said to you; did she say she would meet you?

A. They said—

Q. (Interposing): No, just she.

A. She said when I got to the airport to call the house and she would meet me at the airport.

Q. What else did she say?

A. That is about all.

Q. When did she tell you to come up here? [134]

A. She told me that over the 'phone.

Q. What exactly did she say?

A. That is exactly the way she said it; she said, "Things are all right; things are good."

Q. You had not said anything to her to invite that conversation?

A. No.

Q. She said, "Things are good, come on up."?

A. She said, "Things are all right."

Q. What other conversation did you have with her?

A. That is about all we talked about.

Q. Now, at no time did she tell you to get on the plane to come up here, that you could practice prostitution in her house after you got here, did she?

A. She didn't use the word of "prostitute".

(Testimony of Rose Drucilla West Dill.)

Q. All right.

A. But she said it was at her place and I stayed right there.

Q. She didn't say to you that you could stay with some men for thirty dollars and twenty dollars or fifty dollars, or anything like that?

A. No, she didn't tell me the prices over the 'phone. [135]

Q. And as I understand your testimony, you didn't know this woman before or didn't see her before?

A. Just talked to her over the 'phone.

Q. So far as you know, she didn't know who you were? A. No, sir.

Q. Now, did you have anything to drink when you were talking to her on the telephone?

A. No, sir, I didn't.

Q. Were you sober at that time?

A. Yes, sir.

Q. What about on this second conversation, were you sober then? A. Yes, sir.

Mr. Kosher: That is all.

Mr. Volinn: One further question.

Recross Examination

By Mr. Volinn:

Q. Did you tell Mrs. Heller or anybody that you were just coming up for a week or ten days?

Mr. Guterson: Can we have this related to a 'phone call?

(Testimony of Rose Drucilla West Dill.)

By Mr. Volinn:

Q. (Continuing): On your 'phone calls, when [136] you were talking to Mrs. Heller, did you mention to her you were coming up for a week or ten days?

A. I didn't say how long I was going to stay, or nothing, over the 'phone. We never even talked about how long I would stay, or nothing.

Mr. Volinn: I have nothing further.

Mr. Guterson: I have nothing further.

The Court: That is all.

(Witness excused.)

The Court: Do you want to call another witness or take a recess?

Mr. Guterson: I have a short witness.

The Court: All right.

Mr. Guterson: Mr. Scarpete? [137]

JOE SCARPETE

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: State your full name and spell your last name, please.

The Witness, Joe Scarpete, S-c-a-r-p-e-t-e (spelling).

By Mr. Guterson:

Q. Just keep your voice up. What is your full name, sir? A. Joe Scarpete.

(Testimony of Joe Scarpete.)

Q. What is your home address?

A. Box 427, Los Banos.

Q. Los Banos? A. Yes.

Q. How long have you lived in Los Banos?

A. All my life.

Q. Do you know Rose West? A. Yes.

Q. How long have you known her?

A. About three or four years.

Q. In April, 1955, did you own an automobile?

A. Yes.

Q. What kind of a car was it?

A. Black Pontiac, 1950.

Q. At that time how far did you live from where Mrs. West lived? A. Right next door.

Q. Did you ever have occasion to drive her from Los Banos to San Francisco, California?

A. Yes.

Q. Was anyone in the car besides you and Rose?

A. Yes.

Q. Who else? A. Tony and Pat Baffuna.

Q. Was it in the morning or evening?

A. In the evening.

Q. About what time did you leave Los Banos?

A. Between a quarter to eight and eight o'clock;
I am not sure.

Q. Where did you go in San Francisco?

A. To the airport.

Q. Did you leave Miss West off? A. Yes.

Q. Where did you leave her off?

A. Right at the airport. [139]

Q. The entrance to the airport? A. Yes.

(Testimony of Joe Scarpete.)

Q. Did she have any luggage or baggage with her? A. Yes.

Q. Did she take it with her?

A. No, she went in first and a porter came and got the luggage.

Q. And a porter came and got the luggage?

A. Yes.

Q. Where did Miss West go?

A. I don't know.

Q. She left the car? A. Yes.

Q. Where did you and Mr. and Mrs. Baffuna go? A. Back home.

Q. Back to Los Banos? A. Yes.

Q. You arrived there later, or earlier, in the morning? A. Yes.

Mr. Guterson: Nothing further.

The Court: Did she fill your car with gas? [140]

The Witness: Yes.

Cross Examination

By Mr. Kosher:

Q. Was she sober at the time? A. Yes.

Q. Do you know—could you tell—whether she had had anything to drink before you took her to the airport?

A. We stopped one place and had a beer before we got there.

Q. How much beer did you have there?

A. One bottle.

Q. Do you know whether or not she brought any liquor with her? A. No.

(Testimony of Joe Scarpete.)

Q. You don't know whether she did or not?

A. No, I don't.

Q. You know Mr. Berg here, don't you?

A. Yes.

Q. You knew him in Los Banos? A. Yes.

Q. Now, did Rose tell you when you took her to the plane that she was coming up here to get married? A. No. [141]

Mr. Kosher: I think that is all.

Mr. Guterson: I have nothing further.

Mr. Volinn: I have no questions.

Mr. Kosher: No further questions.

The Court: No questions?

Mr. Volinn: No questions.

The Court: That is all.

(Witness excused.)

The Court: Do you have another short one?

Mr. Guterson: Yes. Mr. Baffuna? [142]

TONY BAFFUNA

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: State your full name and spell your last name, please.

The Witness: Tony Baffuna, B-a-f-f-u-n-a, (spelling).

By Mr. Guterson:

Q. Will you state your full name, sir?

(Testimony of Tony Baffuna.)

A. Tony Baffuna.

Q. And what is your home address?

A. Post—well, home address is Los Banos but post office box 427.

Q. In Los Banos? A. Yes.

Q. Are you married? A. Yes.

Q. Do you have any children? A. Four.

Q. What kind of work do you do?

A. Truck driver.

Q. How long has your home been Los Banos?

A. All my life; about twenty-nine years. [143]

Q. Do you know Rose West? A. Yes.

Q. How long have you known her approximately?

A. Oh, about four or five years, maybe more.

Q. Did you ever drive in an automobile with Rose West from Los Banos to San Francisco, California? A. Yes.

Q. Do you recall approximately when that was?

A. That was a night in April.

Q. April of this year?

A. April of this year.

Q. And who else was in the car?

A. My wife and my cousin Joe.

Q. Joe is your cousin? A. Yes.

Q. What is your wife's name?

A. Patricia.

Q. The three of you and Rose West?

A. That is right.

Q. Who was driving? A. Joe. [144]

Q. Who was sitting in the front seat with him?

(Testimony of Tony Baffuna.)

A. Rose.

Q. And you and your wife in the back seat?

A. Yes.

Q. What time did you leave?

A. Eight o'clock.

Q. Where did you go in San Francisco?

A. Airport.

Q. Did you leave Rose off at the airport?

A. We parked in front of the airport and she got off.

Q. Did she have any luggage with her?

A. Yes.

Q. Did she take that with her or did somebody move it?

A. A porter came and got it a while later.

Q. Did you see where she went?

A. We pulled out as soon as the porter came and got her bags.

Q. About what time was that when you left her?

A. Around midnight or later.

Q. And did you return home?

A. That is right. [145]

Mr. Guterson: I have nothing further.

Cross Examination

By Mr. Kosher:

Q. Did she tell you she was coming up to Seattle to get married? A. No, she never.

Q. Did she tell you what she was coming to Seattle for?

A. She didn't tell us she was coming to Seattle.

(Testimony of Tony Baffuna.)

Q. You don't know where she was going?

A. That is right.

Q. And you don't know whether she came to Seattle or not? A. That is right.

Q. Had she been drinking at all?

A. Not that I know of. I don't make acquaintance with anybody.

Q. Did you stop off at a tavern there for some beer?

A. Yes, we did. I never got off the car. Joe and Rose West got off at the Glow Worm at the other side of Redwood City.

Q. To go into a tavern? A. Yes. [146]

Q. How long were they there?

A. I believe about five or ten minutes at the most.

Mr. Kosher: That is all.

Mr. Volinn: I have no questions.

Mr. Guterson: Nothing further. Thank you.

The Court: That is all.

(Witness excused.) [147]

* * * * *

J. S. FUDIE

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: J. S. Fudie, F-u-d-i-e (spelling).

(Testimony of J. S. Fudie.)

By Mr. Guterson:

Q. Will you state your full name, sir?

A. J. S. Fudie.

Q. And what is your home address?

A. 324 Bellvue North, Seattle.

Q. What is your work, sir?

A. I am an operations manager for Western Union Telegraph Company.

Q. How long have you been employed by Western Union?

A. Thirty-six years.

Q. How long have you been operations manager for the Seattle office?

A. For the last hitch since 1950. I was here 1943 to 1949, and then 1950 to the present date.

Q. What in general are your duties? [150]

A. In my occupation as operations manager I supervise, direct and coordinate all operating functions in this area.

Q. What is your position with regard to records and telegrams that originate and terminate in the Seattle area?

A. I am the custodian.

Q. Pursuant to my request and subpoena did you bring a money order application with you, sir?

A. Yes.

Q. May I have it?

A. (Witness hands document to counsel.)

The Clerk: Plaintiff's Exhibit 2 marked for identification.

(Plaintiff's Exhibit 2 marked.)

(Testimony of J. S. Fudie.)

By Mr. Guterson:

Q. I now hand you what has been marked for identification as Plaintiff's Exhibit 2 for identification purposes only. Can you, Mr. Fudie, simply tell us what that is?

A. That is a money order application.

Q. What date does it bear?

A. April 6, 1955.

Q. Did that originate in the Seattle office? [151]

A. It did.

Q. Are you the custodian of that record?

A. That is right.

Q. Is this a record kept in the ordinary *court* of Western Union's business? A. Yes, sir.

Q. Is that the ordinary type of application one would make out to apply for a Western Union money order?

A. That is our standard form, yes.

The Court: What is the number of that?

Mr. Guterson: This is Plaintiff's Exhibit 2. I will offer Plaintiff's Exhibit 2 at this time, your Honor.

Mr. Kosher: Well, your Honor, on behalf of the Defendant Victoria Heller I will object on the grounds it is hearsay as to her and it is not connected up as having been sent by either one of these defendants.

Mr. Volinn: I will object to it on the same grounds and I will object further. I don't think that presently it is relevant. There is no showing as to the fact that it relates to either one of the defend-

(Testimony of J. S. Fudie.)

ants, and the Defendant Berg in particular; and for the further ground it is not such a [152] record as contemplated by the regular form business record.

The Court: Is Exhibit 1 for identification in?

Mr. Guterson: No, I haven't offered that at this stage.

The Court: Well, I think as a business record it is established.

Mr. Guterson: Yes, your Honor.

The Court: Its relevancy may not be established yet.

Mr. Guterson: I will go into it, your Honor.

The Court: All right.

Mr. Guterson: With this and the next witness.

The Court: All right. I will——

Mr. Guterson (Interposing): I am not offering 1, just 2.

The Court: Well, I will sustain the objection at this time, without indicating otherwise that it may be admissible.

Mr. Guterson: May I inquire further with regard to it?

The Court: You may. [153]

By Mr. Guterson:

Q. Now, I will direct your attention once again, if I may, Mr. Fudie, to Plaintiff's Exhibit 2 for identification purposes. When a money order application such as that is made out here in Seattle what course does it go through; what are the operations?

A. Well, when the money order application is

(Testimony of J. S. Fudie.)

made out in Seattle it is processed and sent to the operations room and the text in this block here is transmitted to the destination point by telegraph.

Q. And is it transmitted to the Western Union Office nearest to the destination point?

A. In this case, yes; transmitted to Fresno, California.

Q. That particular money order? A. Yes.

Q. Now, is there a Western—a regularly constituted Western Union Office in Fresno, California?

A. There is, yes.

Q. Do you know whether or not there is such an office in Los Banos, California?

A. Not a money order office.

Q. For the transmission of money, do you [154] have an agency?

A. We have an agency in Los Banos.

Q. Who is that?

A. I believe it is——

Mr. Guterson (Interposing): I will mark this.

The Clerk: Plaintiff's Exhibit Number 3 marked for identification.

(Plaintiff's Exhibit 3 marked.)

By Mr. Guterson:

Q. I will now hand you Plaintiff's Exhibit 3 for identification purposes only. Can you identify it and tell us what that is?

A. That is the Western Union draft made out on the strength of this application that was telegraphed to Fresno, California.

Q. Now, in your duties as operations manager

(Testimony of J. S. Fudie.)

of the Seattle office, are you the custodian of that record?

A. That is right; yes.

Q. Is that an ordinary business record when the destination point on an application does not have a regularly constituted Western Union office?

A. No. In cases like this—— [155]

Q. (Interposing): Yes?

A. (Continuing): ——all drafts come back and are attached to the application which completes the transaction.

Q. I see. In your records, were those two documents, Plaintiff's Exhibit 2 and Plaintiff's Exhibit 3 attached in your records?

A. They were, yes.

Q. And when brought into Court pursuant to my subpoena they were attached?

A. They were attached.

Q. And they relate one to the other?

A. That is right.

Q. And what is the amount on the draft?

A. \$60.38.

Q. Who is it made out to?

A. To the American Trust Company.

Q. Is that an agency of Western Union Company?

A. That is a banking agent, yes, sir; banking agent.

Q. Connecting that with Plaintiff's Exhibit 2 for identification, can you explain the difference between sixty dollars and \$60.38?

(Testimony of J. S. Fudie.)

A. The thirty-eight cents is the fee we pay [156] our agent for handling the transaction for us.

Q. And your agent in this case is American Trust? A. That is right.

Q. Does it bear their stamp on the back?

A. Yes, it does.

Q. Now, at all times these matters have been under your control as custodian of the business records in the Western Union Office here in Seattle?

A. That is right.

Mr. Guterson: I believe that is all.

Mr. Kosher: No questions.

Mr. Volinn: No questions.

The Court: That is all.

Mr. Guterson: Thank you, Mr. Fudie.

The Court: Mr. Fudie may be excused too?

Mr. Guterson: He may.

Mr. Kosher: Yes.

Mr. Guterson: Will you wait in the anteroom a moment?

The Witness: Yes.

(Witness excused.)

Mr. Guterson: Will you call Mrs. Fick? [157]

ETTA FICK

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Mrs. Etta Fick, F-i-c-k (spelling).

(Testimony of Etta Fick.)

Direct Examination

By Mr. Guterson:

Q. Will you keep your voice up please and state your full name very clearly for everyone to hear?

A. Mrs. Etta Fick.

Q. Where do you live, Mrs. Fick?

A. 9903 Des Moines Way.

Q. Is that here in Seattle? A. Yes, sir.

Q. Are you employed at the present time?

A. Yes, sir.

Q. By whom? A. Western Union.

Q. Here is Seattle? A. Yes, sir.

Q. How long have you been an employee of Western Union Company? [158]

A. About twelve years.

Q. And you were employed by them, were you, on the sixth of April of this year?

A. Yes, I was.

Q. And what shift do you work?

A. From five o'clock in the evening until one o'clock in the morning.

Q. And that is the shift you were working at that time? A. Yes.

Q. Now, I am going to hand you what has been marked as Plaintiff's Exhibit 2 for identification purposes, Mrs. Fick. I would ask you just to examine it. Do your initials appear on that exhibit?

A. Yes, they do.

Q. And what are they, as written? A. E. F.

Q. And what is the date on that exhibit?

A. April sixth.

(Testimony of Etta Fick.)

Q. Now, is that an ordinary application for Western Union money order? A. Yes, it is.

Q. And does your writing appear anywhere else on there besides your initials?

A. Yes, it does. [159]

Q. Can you tell us what else you have written on there?

A. Yes, "50", night letter; "Paid, April 6"; and the charges. There was "\$60.75" charges, "\$1.10" toll, "11c" tax, total "\$61.96." And then more.

Q. Go on.

A. "Fresno, California", and then "60", the figures in parenthesis, and the word "call" and the 'phone number.

Q. What 'phone number?

A. "Rose West, phone 2404."

Q. I see; now, did you wait on the person that made that application for money order?

A. Yes.

Q. That was in the ordinary course of your duties as an employee? A. Yes, it was.

Q. Now, the writing on there that is not yours, the pencilled writing, was that made by the applicant; was that made by the person who came in to ask for the money order?

A. Yes, it must have been.

Q. You waited on him? A. Yes.

Mr. Guterson: Before I ask the witness [160] to read this in, I will reoffer Plaintiff's Exhibit 2 at this time, your Honor.

Mr. Kosher: Your Honor, again on behalf of

(Testimony of Etta Fick.)

Victoria Heller I object as hearsay as to her and further on the ground it has not been established that these documents related to either one of these defendants. The sender of that telegram has not been identified as either one of these two defendants.

Mr. Volinn: I will likewise object on the same grounds. There has been no relationship shown to the Defendant Berg.

The Court: You still have Exhibit 1?

Mr. Guterson: No. I just had the first witness identify 1. I don't want to offer 1 yet. I can have her read it to tie it up.

The Court: Well, she can't read it, of course, until it is introduced.

Mr. Guterson: That is right.

Mr. Kosher: May I ask her just one question?

The Court: It seems to me these should come in as one.

Mr. Guterson: Offer them together?

The Court: When you get them all together.

Mr. Guterson: Fine.

The Court: I do not necessarily recognize the validity of the objection. However, I will not rule on it at this time but I suggest if you have any questions here you should ask them.

Cross Examination

By Mr. Kosher:

Q. Now, Ma'am, so far as you know, I could have sent that telegram, isn't that right?

A. If you can write the same writing.

(Testimony of Etta Fick.)

Q. Now, isn't it a fact I could have had somebody write that telegram and brought it in to you and paid you \$61.38, or whatever it was, and you would have sent it on?

A. The person who wrote that out, I took their money and sent it.

Q. What you mean to say is that the person who came to the desk and handed you that document and gave you \$61.38, or whatever it was, is the person you got it from, is that right?

A. Yes.

Q. And you don't know who that person is?

A. No.

Q. You wouldn't recognize him in this court [162] room, would you?

A. Well, I wouldn't.

Q. You wouldn't be able to because there are so many people that come in all the time; is that right?

A. That is right.

Mr. Kosher: That is all. We renew our objection.

Mr. Volinn: And I renew mine.

The Court: The Court is reserving ruling.

Mr. Guterson: I understand. Are there any further questions?

Mr. Kosher: No further questions.

Mr. Volinn: No further questions of this lady.

Mr. Guterson: You have nothing further, Mr. Volinn?

Mr. Volinn: No.

Mr. Guterson: Thank you, very kindly.

(Testimony of Etta Fick.)

The Witness: All right.

(Witness excused.)

Mr. Guterson: Mr. Warren? [163]

HERBERT WAYNE WARREN

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Herbert Wayne Warren.

The Clerk: W-a-r-r-e-n (spelling)?

The Witness: Yes.

By Mr. Guterson:

Q. Will you state your full name?

A. Herbert Wayne Warren.

Q. What is your home address?

A. 7486 East American, Fowler, California.

Q. How far is Fowler, California, from Fresno, California? A. Eight miles.

Q. Are you employed at the present time?

A. Yes, sir, I am.

Q. And where do you work?

A. Western Union in Fresno.

Q. Western Union in Fresno? A. Yes, sir.

Q. How long have you been working for [164] the Western Union Company, sir?

A. Ten months.

Q. You came to Seattle pursuant to my request?

A. Yes, sir.

(Testimony of Herbert Wayne Warren.)

Q. I am now going to hand you what has been marked as Plaintiff's Exhibit 3 for identification purposes only. Will you examine that, sir? Does your signature appear thereon?

A. Yes, sir, it does.

Q. Did you sign that personally?

A. Yes, sir.

Q. And what is that document?

A. It is a Western Union money order.

Q. A draft?

A. Yes, sir, a draft to the American Trust Company in Los Banos.

Q. Did you make that out in the ordinary course of business in the Fresno Office?

A. Yes, sir.

And on what information, or pursuant to the receipt of what information, did you make it out?

A. On a money order draft that we received from Seattle. [165]

Q. I will hand you what has been marked as Plaintiff's Exhibit 2. Is this similar, or have you seen a copy of that before, if you know?

A. Yes, sir, I have.

Q. Now, is that the document which you received which—upon the basis of which you made out your draft and forwarded it to Los Banos?

A. Yes, sir, we received a duplicate of this copy.

Q. I see; now, who did you make the draft payable to, the draft you made out?

A. This is payable to the American Trust Company.

(Testimony of Herbert Wayne Warren.)

Q. And in what amount? A. \$60.38.

Q. Now, when was that transmitted from Fresno to Los Banos?

A. The draft I hold here was transmitted by mail.

Q. Do you yourself remember making it out and preparing it for the mail?

A. Yes, sir. We have a form. We make it out and put it in an envelope to be mailed the following day.

Q. What date appears on that exhibit? [166]

A. April 7th.

Q. Now, that is an ordinary business document made out by your office, is that correct, sir?

A. Yes, sir, it is.

Q. Examining once again the face of that draft, the typed in matter, the payee and so forth, are those typed in by your office?

A. Yes, sir, they are.

Q. Now, referring them to the information that is typed on the draft which you have signed, who does it have marked below as the payee?

A. Rose West.

Q. And who is the sender? A. Ted Berg.

Mr. Guterson: I have nothing further.

Mr. Kosher: I have no questions.

The Court: That is all.

Mr. Guterson: Thank you, Mr. Warren.

(Witness excused.)

Mr. Guterson: Mr. La Rossa. [167]

LOUIS LA ROSSA

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Louis La Rossa, L-a R-o-s-s-a (spelling).

By Mr. Guterson:

Q. Will you state your full name, sir?

A. Louis La Rossa.

Q. What is your home address?

A. 920 J Street, Los Banos, California.

Q. What is your employment?

A. Banking, American Trust Company.

Q. How long have you been an employee of the American Trust Company? A. Twenty years.

Q. That is American Trust Company of Los Banos, California?

A. At Los Banos, California, yes.

Q. What is your position or title there?

A. I am assistant cashier and most of my work is loaning officer and I spend some time on operations. [168]

Q. I see; now, pursuant to my request did you bring an instrument from Los Banos?

A. Yes, sir, I did.

Q. May I have it, sir?

A. (Witness handed document to counsel.)

(Testimony of Louis La Rossa.)

The Clerk: Plaintiff's Exhibit 4 marked for identification.

(Plaintiff's Exhibit 4 marked.)

By Mr. Guterson:

Q. Are you a custodian of the records of the American Trust Company?

A. Yes, sir, I am.

Q. What relationship does the American Trust Company of Los Banos have to the Western Union Company?

A. We act as agent for them in paying and receiving money orders.

Q. What is the central, or closest regular Western Union Office to Los Banos?

A. Fresno, California.

Q. I will hand you what has been marked as Plaintiff's Exhibit 4 for identification purposes only. Can you just tell us what that is? [169]

A. Yes. This is a wire, money order wire, sent out of Seattle, Washington, and that is to pay sixty dollars——

Q. Don't say what it says. Out of Seattle?

A. Out of Seattle.

Q. Was it transmitted through the Fresno Office of Western Union? A. Yes, sir.

Q. Does it bear Fresno identification?

A. Yes, sir, it does.

Q. Was that received by your office?

A. Yes, sir, it was.

Q. Is there some marking on there to show that it was? A. Yes, sir.

(Testimony of Louis La Rossa.)

Q. And that has been retained by the American Trust Company? A. Yes, sir, it has.

Q. Is that kept in their files and records?

A. Yes, sir, it has.

Q. Considered an official business document of your firm?

A. Yes, sir, a permanent record.

Q. I will now hand you what has been marked as Plaintiff's Exhibit 1 for identification purposes. [170] Will you examine that? Can you simply tell us what that is?

A. Yes. This is an entry to the general ledger. In other words, that is the only way we could carry this. When we pay out the money is in accounts receivable, so that that is what that is.

Q. Do you have an accounts receivable fund for your work, sir?

A. Yes, sir, to take care of things like this, Western Union wires.

Q. Is that an official business record of American Trust Company? A. Yes, it is.

Q. That is retained by your company?

A. Yes, sir.

Q. And it has been retained in your files?

A. Yes, sir.

Q. Now, does this document, Plaintiff's Exhibit 1 for identification, show who signed as recipient of the sixty dollars? A. Yes, sir.

Q. And who does it show? A. Rose West.

Q. Now, do your initials, or does your mark, appear anywhere on that instrument? [171]

(Testimony of Louis La Rossa.)

A. Yes, sir, it does. It is an authorized signature.

Q. Can you point that out?

A. (Witness pointed to document.)

Q. The bottom writing?

A. The bottom writing.

Q. And what does that say? A. La Rossa.

Q. Do the initials or name of some other employee of your firm appear thereon also?

A. Yes, sir, it does.

Q. I will hand you again Plaintiff's Exhibit 4 for identification. Does this contain the initials of any—of some employee of the American Trust Company? A. Yes, sir, it does.

Q. I see. Now, referring you once again to Plaintiff's Exhibit 4, which is in front of you, what authority does the American Trust Company have upon receipt of something like that in order to pay the alleged payee?

A. We have an agreement with the Western Union, since their office is so small in Los Banos that they do not have facilities for carrying enough money there to pay these wires out—we have the [172] authority upon receipt of this wire to pay to the—to whomever it is payable to.

Q. And that is done as an ordinary thing?

A. That is done as an ordinary thing.

Q. This document, Plaintiff's Exhibit 1, is that evidence of the actual payment?

A. Yes, sir, it is.

Q. And is the name—is the signature of the

(Testimony of Louis La Rossa.)

payee of 1 the same person as the person alleged to be the payee on 4? A. Yes, sir.

Q. And both of these documents have been retained by your firm? A. Yes, sir.

Mr. Guterson: I have nothing further.

Mr. Kosher: I have no questions.

Mr. Volinn: I have a question.

Cross Examination

By Mr. Volinn:

Q. Mr. La Rossa, you testified you spent most of your time at the bank as a lending officer?

A. Yes, sir.

Q. You interview people and discuss loans with them, and so forth? A. Yes, sir. [173]

Q. So far as—how about the custody of the records there, you do have a person at the bank employed who is in charge of records?

A. Well, I am one of them.

Q. And you have others?

A. Well, of course, the filing is done maybe by others but we go through them and see that they are in proper order and so on.

Q. Is there anyone at the bank who is officially designated as being a record custodian?

A. No, there isn't.

Mr. Volinn: I have no further questions.

Redirect Examination

By Mr. Guterson:

Q. You are one of the custodians?

(Testimony of Louis La Rossa.)

A. I am considered one of them, yes.

Mr. Guterson: I see. I have nothing further.

Mr. Kosher: No questions.

Mr. Guterson: Thank you.

(Witness excused.)

Mr. Guterson: Call Mrs. Etcheverry. [174]

ELLENA ETCHEVERRY

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your name and spell your last name, please?

The Witness: Mrs. Ellena Etcheverry, E-t-c-h-e-v-e-r-r-y (spelling).

By Mr. Guterson:

Q. Will you speak very loudly, please? What is your full name?

A. Mrs. Ellena Etcheverry.

Q. And what is your home address?

A. Route 1, Box 333, Los Banos, California.

Q. How long have you lived in Los Banos?

A. All my life.

Q. Are you employed at the present time?

A. Yes, I am.

Q. Where at?

A. The American Trust Company.

Q. What kind of work do you do in the American Trust Company? A. A note teller.

(Testimony of Ellena Etcheverry.)

Q. Excuse me? [175] A. A note teller.

Q. How long have you been employed by the American Trust Company?

A. Twelve years.

Q. What, in general, are your duties as a note teller? A. Well, I take loan payments.

Q. Wait on customers, do you?

A. Some, yes.

Q. I am going to hand you what has been marked as Plaintiff's Exhibit 4 for identification and I want you to take a look at that and then tell us whether or not your name or initials appear thereon? A. They do.

Q. Will you speak loudly? A. They do.

Q. What did you write on there?

A. That I called her, and my name.

Q. Excuse me?

A. That I called her and my name.

Q. Your name appears thereon? A. Yes.

Q. And you say you made a call and jotted that down also? [176] A. I did.

Q. Did you make a call to the person written on there as the payee? A. Yes, I did.

Q. Did you speak with her?

A. When I waited on her.

Q. When you called did you actually talk to her? A. Yes, I did.

Q. Now, I will show you what has been marked as Plaintiff's Exhibit 1 for identification. Will you examine that? Does your name or initials appear thereon, Ma'am? A. Yes, they do.

(Testimony of Ellena Etcheverry.)

Q. Did you write anything else on there besides your name? A. No, just typed on here.

Q. Speak up.

A. Just typed on here who the wire was sent to, by whom, and where.

Q. That is in connection with your record, is that correct? A. That is correct.

Q. Now, were you the one that actually waited on the lady who came in to get the sixty dollars [177] pursuant to that order? A. Yes, I did.

Q. Do you recognize that lady in the court room now; will you look around and see if you can see her? A. No.

Q. Will you look all through the court room?

A. Now, I do.

Q. Will you—where is she sitting?

A. In the second row, the girl with the black suit.

Mr. Guterson: Will you stand, please?

By Mr. Guterson:

Q. Is that the girl? A. Yes, it is.

Q. Did she sign her name when you gave her the sixty dollars? A. Yes, she did.

Q. Was that in your presence? A. Yes.

Q. Now, right under where you signed your name this other writing that is done by Mr. La Rossa is, is it? A. That is right.

Q. And these two documents have been kept by your company so far as you know, is that it?

A. That is right.

Q. On Plaintiff's Exhibit 4 where you wrote

(Testimony of Ellena Etcheverry.)

your name you wrote the word "call" underneath, is that correct; is that your writing? A. Yes.

Q. And right above that the stamp "April 7", was that made by your office? A. Yes.

Q. Now, the stamp on this document, Plaintiff's Exhibit 1, "April 7", was that made by your office?

A. Yes, it was.

Q. Does that indicate the date the sixty dollars was paid? A. Yes, it does.

Q. And the signature was made in your presence, is that correct? A. Yes.

Q. Did you actually give the lady the sixty dollars? A. Yes, I did.

Q. And was that done in cash? A. Yes.

Mr. Guterson: I have nothing further. [179] Well, just one minute. At this time, if your Honor please, I will offer Plaintiff's Exhibit 1, Plaintiff's Exhibit 2, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4.

Mr. Kosher: Your Honor, on behalf of the Defendant Victoria Heller I object to them on the grounds there is no connection between these exhibits and Mrs. Heller and no showing she had anything to do with the sending of the money. She is in no way identified with having anything to do with any of these exhibits and they are hearsay as to her.

Mr. Volinn: I will object to them on the grounds there is no showing that these documents are related to the Defendant Berg.

The Court: The Court will overrule the objec-

(Testimony of Ellena Etcheverry.)

tions as to Berg. What is the Government's position as to the Defendant Heller?

Mr. Guterson: I think the documents are properly in evidence and a precautionary instruction should be given the jury.

The Court: You agree they are not to be considered except with relation to the Defendant Berg?

Mr. Guterson: Oh, certainly. That is [180] the sole purpose.

The Court: Exhibits 1, 2, 3 and 4 may be admitted. They are to be considered with respect to the Defendant Berg; not as to the Defendant Heller.

(Plaintiff's Exhibits 1, 2, 3 and 4 admitted.)

Mr. Guterson: Yes, your Honor.

Mr. Kosher: May I cross examine this lady?

Mr. Guterson: Just one moment.

If your Honor please, with the Court's permission, now that these are in evidence, would it be proper for me to read them instead of asking the witness?

The Court: Yes, you may read them. He may have some questions.

Mr. Kosher: Yes, I have.

Cross Examination

By Mr. Kosher:

Q. You say you remember this lady sitting next to the gentleman sitting on the corner there?

A. Yes, I do.

Q. Will you tell me whether or not her hair is the same color today as the day you allegedly [181]

(Testimony of Ellena Etcheverry.)

gave her the sixty dollars? A. No, it isn't.

Q. What color was the hair of the lady you gave the money to? A. Blonde.

Q. Platinum or peroxide blonde?

A. Peroxide, I guess.

Q. And the color of her hair now is what?

A. I would say red.

Q. Did you recognize the person?

A. I recognize the face.

Q. Did you ever know her before you gave her the sixty dollars? A. No.

Q. Did you ever see her before? A. No.

Mr. Kosher: I think that is all.

Mr. Volinn: I have no questions.

Mr. Guterson: I have nothing further.

The Court: You may be excused.

(Witness excused.) [182]

* * * * *

H. W. McCaffrey

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: H. W. McCaffrey, M-c C-a-f-f-r-e-y (spelling).

By Mr. Guterson:

Q. Will you state your full name?

(Testimony of H. W. McCaffrey)

A. H. W. McCaffrey. M-c C-a-f-f-r-e-y (spelling).

Q. What is your home address?

A. 2323 Eyres Place, Seattle.

Q. What type of employment do you follow?

A. I am employed by the Pacific Telephone and Telegraph Company as chief special agent.

Q. How long have you been employed by the telephone company? A. Since 1921.

Q. And you say your title at the present time is chief special agent? A. That is correct.

Q. How long has that been your duty?

A. Since 1943. [185]

Q. Do you have any area over which you are chief special agent?

A. The Washington and Idaho area.

Q. What in general are your duties, Mr. McCaffrey, as chief special agent?

A. We handle claims for and against the telephone company, personal injuries, property damage, or criminal matters that might affect the company, and, in addition, I have the assignment of appearing and presenting records under subpoena.

Q. For the purpose of testimony in court you are custodian of 'phone company records, is that true? A. Yes.

Q. For the Washington-Idaho area?

A. That is correct.

Q. And so designated by your company?

A. Yes.

(Testimony of H. W. McCaffrey)

Q. And you have testified in court in that manner on many other occasions? A. Yes.

Mr. Volinn: I will object to the question and answer.

The Court: What is objectionable about that?

Mr. Volinn: Well, testifying—the business of testifying in court. The man testifies he is record [186] custodian. That is one thing but I believe there is some prejudice if this man appears in that capacity.

The Court: The objection may show. Overruled. By Mr. Guterson:

Q. Pursuant to my request contained in the subpoena, Mr. McCaffrey, did you bring with you records of or subscribable to Adams 5680?

A. I have.

Q. And according to the official 'phone company records relating to Adams 5680, who is listed as the subscriber or owner of that 'phone number?

A. It was Godfrey Heller.

Q. You say it was Godfrey Heller. When did that service terminate?

A. As of May 20th of this year.

Q. All right; then, as of the first of April until the thirteenth of April, 1955, at that time who was the subscriber of the listed 'phone number?

A. Godfrey Heller.

Q. Now, further in pursuance to my request did you bring into the court, Mr. McCaffrey, various toll tickets relating to long distance telephone calls which originated at Adams 5680?

(Testimony of H. W. McCaffrey)

A. Yes, I have. [187]

Q. You brought all of them as my subpoena requested? A. That is right.

The Clerk: Plaintiff's Exhibit 5, marked for identification.

(Plaintiff's Exhibit 5 marked.)

By Mr. Guterson:

Q. I now hand you what has been marked as Plaintiff's Exhibit 5 for identification purposes only, Mr. McCaffrey. Can you tell us what that is?

A. It is the record of a long distance call from Seattle, Adams 5680. Do you want the complete detail?

Q. From that are you able to determine whether or not the call originated at Adams 5680?

A. Yes, it did.

Q. Is there a marking on there which explains that to you? A. That is right.

Q. And who was the recipient of that call, what number?

A. It went to Los Banos, California, 2404.

Q. Is there a date on that?

A. April 3, 1955. [188]

Q. Is there a time that the call was put through marked on the toll ticket? A. 6:22 a.m.

Q. Does that ticket indicate the length of time that the conversation took?

A. It was a twelve minute conversation.

(Whereupon there was a brief pause.)

Mr. Guterson: I will offer plaintiff's Exhibit 5, your Honor.

(Testimony of H. W. McCaffrey)

Mr. Kosher: If your Honor please, I object to that Exhibit on the grounds there has been no connection shown between the defendant Heller and that Exhibit. This telephone number now was apparently registered to a man by the name of Godfrey Heller. There is no showing that this telephone call, if there was one made, went to the complaining witness in this case.

The Court: Well, the numbers will appear thereon and I think it is a matter for the jury to determine under the evidence here.

Mr. Volinn: I will object also, your Honor, there being no relationship shown as to the defendant Berg.

The Court: You make the same objection?

Mr. Volinn: Yes.

The Court: The objections may be shown as to [189] both defendants. Objections overruled. It is admitted.

(Plaintiff's Exhibit 5, admitted.)

The Court: This conversation was on April 3. Is this the conversation had where allegedly the defendant Heller also spoke?

Mr. Kosher: No.

Mr. Guterson: Yes. This is the first conversation, Sunday morning, April 3, 6:22 a.m. as testified to by the government's witness, according to the first witness of the government. She testified she talked to both people.

The Court: On that conversation?

Mr. Guterson: Yes.

(Testimony of H. W. McCaffrey)

The Court: It is admitted then as to both.

The Clerk: Plaintiff's Exhibit 6 marked for identification.

(Plaintiff's Exhibit 6, marked.)

Mr. Volinn: Excuse me, your Honor, also if the Exhibit has been admitted already I would like to offer another objection to the Exhibit just admitted and I assume the record will show. I would also object for the following ground: it has not been shown that Mr. McCaffrey is the qualified custodian of these records. The statement was that he is the custodian for the purpose of appearing [190] in court and I take it that does not mean he is custodian of the records as such, and I would object also that he is not qualified to testify as to what they are.

The Court: Mr. McCaffrey, do I understand that you have been designated by your company as a custodian of these records?

The Witness: For the purpose of answering subpoenas duces tecum, yes, which designation was given by Mr. George F. Dean, vice-president and general manager.

The Court: Do you have special authority on each occasion?

The Witness: General authority.

The Court: General authority?

The Witness: Yes, sir.

The Court: From whom did you secure these records?

The Witness: From the Commercial Record Office.

(Testimony of H. W. McCaffrey)

The Court: And that is——

The Witness (Interposing): In Seattle.

The Court (Continuing): ——in Seattle? Give us the mechanics of it.

The Witness: Upon learning that these toll records were to be subpoenaed I asked our commercial people to send me the general toll records involved and I have had them in my custody since that time. [191]

The Court: And you made that request pursuant to the authority given you by the general manager or local manager of the telephone company here, your superior?

The Witness: Yes, sir, our general manager.

The Court: Objection overruled.

Mr. Kosher: Exception on behalf of the defendant Heller.

By Mr. Guterson:

Q. I now hand you, sir, what has been marked as Plaintiff's Exhibit 6 for identification purposes only. Can you tell us what that is?

A. This is a record of a toll—long distance telephone call made April 10, 1955, 7:23 p.m. from Adams 5680 to Los Banos, California, 2404.

Q. The date again, sir, is what?

A. April 10, 1955.

Q. Does that show the length of time of the conversation?

A. A six-minute conversation.

(Whereupon, there was a brief pause.)

(Testimony of H. W. McCaffrey)

Mr. Guterson: I offer Plaintiff's Exhibit 6, your Honor.

Mr. Volinn: I will object again on the same grounds, your Honor, that no relationship is shown and, [192] too, that Mr. McCaffrey is not qualified to testify as to these records.

Mr. Kosher: I object on behalf of the defendant Heller on the ground there is no connection between this Exhibit and the defendant Heller and upon the ground no proper foundation has been laid for the asking of this question in relation to the defendant Heller.

The Court: As to the defendant Heller?

Mr. Kosher: I beg pardon.

The Court: As to the defendant Heller?

Mr. Kosher: As to the defendant Heller.

The Court: It appears to me that a telephone call made on the tenth apparently was not a conversation with the defendant Heller, and, therefore, objection is overruled as to the defendant Berg and admitted solely as to the defendant Berg.

Mr. Kosher: And not as to Heller?

The Court: And not as to Heller.

(Plaintiff's Exhibit 6, admitted.)

The Clerk: Plaintiff's Exhibit 7 marked for identification.

(Plaintiff's Exhibit 7, marked for identification.) [193]

By Mr. Guterson:

Q. I now hand you what has been marked Plaintiff's Exhibit 7 for identification purposes, Mr. Mc-

(Testimony of H. W. McCaffrey)

Caffrey. Will you examine that and tell us what that is, sir?

A. That is a record of a long distance call placed April 12, 1955, 10:02 a.m. from Adams 5680 to Los Banos, California, 2404.

Q. What is the time that that call was originally placed? Does that appear?

A. It was placed 10:02 a.m.

Q. Can you tell from examining that proposed Exhibit if and what time the 'phone call was completed?

A. It was completed about 5.45 p.m.

Q. 5:45 in the afternoon on that same date, April 12?

A. That is right.

Q. Can you tell the length of time of the conversation?

A. Yes, that was an eight-minute conversation.

(Whereupon, there was a brief pause.)

Mr. Guterson: I will offer Plaintiff's Exhibit 7, your Honor.

The Court: It is offered as to the defendant Berg only? [194]

Mr. Guterson: Yes, your Honor.

Mr. Volinn: I will again object that there is no relationship shown for one, and, second, that not only is the witness not shown to be properly qualified but actually that the qualifications are not adequate.

The Court: The same objections you made before?

Mr. Volinn: Yes, sir.

(Testimony of H. W. McCaffrey)

Mr. Kosher: The same objection as to Mrs. Heller.

The Court: It is not offered as to Heller. If you wish, you may examine the witness on voir dire if you wish to do so. However, on the showing now made the Court will overrule the objection as to the defendant Berg and admit it as to that defendant and not as to the defendant Heller.

(Plaintiff's Exhibit 7, admitted.)

By Mr. Guterson:

Q. Mr. McCaffrey, in general, a record of a 'phone call which is retained by your office in the form of one of these toll tickets, is that done, sir, only when the 'phone call is charged to a certain number?

A. The record is made, of course, in every instance and is filed against the account to which it is charged.

Q. All right; let us assume that a 'phone call is [195] made and paid for by putting money in the slot right away. Would there be any record of that?

A. Yes.

Q. Relating to that number?

A. The calling number.

Q. And the only 'phone calls that are charged to Adams 5680 would be found in your records pertaining to Adams 5680? A. That is correct.

Mr. Guterson: That is all.

(Testimony of H. W. McCaffrey)

Cross Examination

By Mr. Kosher:

Q. Now, sir, if I were to go out in the hall and dial the long distance operator and tell her I wanted to call Los Banos, California, 2401, or whatever it was, and tell her my name is Godfrey Heller and to please charge it to Adams 5680, could I get such a call through?

A. You would probably if there were someone at Adams 5680 to okey such a charge.

Q. I see; then, in fact, the telephone call may have been made from this courthouse and yet charged to Adams 5680, isn't that right?

A. Not these three. These three particular calls were made from Adams 5680 according to our information.

Q. Assuming what I just told you, assuming I went [196] out in the hall and made such a telephone call, what would the records disclose?

A. The record would show a Main or Eliot telephone number call originating at that number. That number would be scratched out and just below that "Charged to Adams 5680". There would be two entries.

Q. Two entries instead of one? A. Yes.

Q. Now, the documents are made by human beings, are they not?

A. Our long distance operators.

Q. And there are mistakes made on those from time to time, aren't there?

A. It is a possibility.

(Testimony of H. W. McCaffrey)

Q. In fact, in your experience as a telephone man, you know people frequently complain that there are long distance telephone calls charged to their numbers that they did not make?

A. No, that would not be my experience; no, sir.

Q. That has not been your experience?

A. No, sir.

Q. Now, did you check to see how many other telephone calls during the period of April 3 to April 12 were made from Adams 5680 to the number down in Los Banos, California? [197]

A. I have the records here.

Q. *There many calls*, isn't that right?

(Whereupon, there was a brief pause.)

A. I wonder if you would give me those dates again, please.

Q. From April 3 to April 12.

A. I show one other call made on April 12 from Adams 5680 to Los Banos, California, a different—I believe it is a different telephone number. The telephone number is 2444, as I recall that is a different telephone number.

Q. Now, can you tell us how many calls were made from the Los Banos number to Adams 5680? Do you have those records with you?

A. I would have no record in Seattle unless charged to this end—charges reversed.

Q. Do you know whether there were any such calls made, any collect calls made to Adams 5680 during that period of time from that Los Banos number?

(Testimony of H. W. McCaffrey)

A. There is no record of such a call, no, during the month of April.

The Court: I think he answered the question.

Mr. Kosher: Did he answer the question?

The Court: He said there was no record. [198]

The Witness: No.

Mr. Kosher: That is all.

Cross Examination

By Mr. Rousso:

Q. May I clarify — when you said that there were no calls, you mean there was no record of any collect calls?

A. I have no record of any collect calls.

Q. There may have been calls originating that were paid for?

A. I would have no information about calls paid for at the other end.

Mr. Rousso: That is all.

The Court: That is all.

Mr. Volinn: We have no further questions.

The Court: That is all, Mr. McCaffrey.

(Witness excused.) [199]

* * * * *

ROBERT McSHARRY

upon being called as a witness for and on behalf of the plaintiff and upon being first duly sworn, testified as follows:

Direct Examination

The Court: Will you state your full name and

(Testimony of Robert McSharry.)

spell your last name, please?

The Witness: Robert McSharry, M-c S-h-a-r-r-y (spelling).

By Mr. Guterson:

Q. Will you state your full name, sir?

A. Robert McSharry.

Q. What is your home address?

A. 73 Academy Street, South Braintree, Massachusetts.

Q. What is your present occupation, Mr. McSharry?

A. Civil Service employee, M.S.T.S.

Q. Have you been to sea within the past year?

A. Yes, sir.

Q. Are you presently in M.S.T.S.?

A. Yes, sir.

Q. What ship are you on at the present time?

A. I am not on a ship right now.

Q. When did you last get off a ship?

A. Last Friday. [214]

Q. Where was that? A. New York.

Q. What ship were you on?

A. The John R. Towle; Private John R. Towle.

Q. How do you spell that?

A. T-o-w-l-e (spelling).

Q. Were you ever a seaman aboard the John Polk? A. Yes, sir.

Q. During what period of time was that?

A. I went on the Polk in May.

Q. What year was that?

A. 1954 and I go off the Polk in May of 1955.

(Testimony of Robert McSharry.)

Q. During that period from May, 1954, to May, 1955 did the Polk ever dock in Seattle?

A. Constantly.

Q. Do you know the defendant, Victoria Heller?

A. Yes, sir, I do.

Q. Do you recall when you first made her acquaintance?

A. I think about August, 1954.

Q. Do you remember where that was, sir?

A. Here in Seattle.

Q. Do you know the defendant, Theodore Berg?

A. Yes, sir.

Q. And do you recall where you first met Mr. Berg?

A. On the General John Polk.

Q. Was he on that ship also? A. Yes, sir.

Q. When was it you got to know Mr. Berg?
Do you remember when that was?

A. I can't say offhand because in a hatch crew I came in contact with everyone, being quartermaster at the gangway I had to give out the liberty cards, and I would say March—January, February, March; along in there.

Q. I see. What was your employment, what was your work aboard the Polk?

A. I was a quartermaster.

Q. How long have you been in M.S.T.S. shipping out?

A. Off and on I have been working Civil Service since 1942.

Q. Have you ever been at the defendant, Vic-

(Testimony of Robert McSharry.)

toria Heller's home on Mercer Island?

A. Yes, sir.

Q. And when you met Mrs. Heller was she residing at the same home where she lives now?

A. No, sir, another home on West Mercer Way, I think it was.

Q. Do you know when it was she moved to her present residence? [216]

A. I think around November.

Q. Of 1954? A. Yes, sir.

Q. Were you in Seattle at all during the month of December, 1954? A. Yes, sir, I was.

Q. Were you in January, 1955?

A. Yes, sir.

Q. That would be when the Polk would be in port, is that right? A. Yes.

Q. During that period of time did you ever see the defendant, Victoria Heller? A. Yes, sir.

Q. And were you ever at her home at Mercer Island, her present home, during those months?

A. Yes, sir.

Q. During that period of time did you ever have any conversations with Mrs. Heller?

Mr. Volinn: Excuse me.

The Court: I beg your pardon?

Mr. Volinn: Well, if the question is preliminary I would like to point out we will object to any conversations made out of the presence of the defendant Berg. [217]

The Court: Well, when that time comes you may make your objection.

(Testimony of Robert McSharry.)

Mr. Guterson: Would you repeat the question, Mr. Reporter?

The Court: Mr. Reporter, read the question.

(Whereupon, preceding question was read by the Reporter.)

Mr. Kosher: If your Honor please, I object to that on the grounds it is vague — conversations about what?

The Court: Well, first I assume if he had no conversations there wouldn't be any further questions; so that I believe it is preliminary. Objection overruled.

By Mr. Guterson:

Q. You may answer, Mr. McSharry.

A. Yes, I have.

Q. All right; can you tell us what the conversations were about?

Mr. Kosher: I object to that if your Honor please, on the ground it is immaterial; also on the ground there is no time, no place, and who was present.

The Court: I think probably you might get a little more specific.

Mr. Guterson: All right.

By Mr. Guterson: [218]

Q. (Continuing): In December, 1954 did you ever have any conversation with Mrs. Heller at her home on Mercer Island?

A. Yes, sir, we had conversations every trip.

Q. Well, how much time did you spend at her home in December, 1954?

(Testimony of Robert McSharry.)

A. I guess I spent most of my time off watch on the ship for the period of time the ship was in.

Q. All right; now, during the month of December, then, in 1954 when you were at the home of Mrs. Heller, do you recall whether or not you had any conversations with her?

Mr. Volinn: I will object again, your Honor. There is no showing as to who was present or whether the defendant Berg was present and any conversation made, so far as the showing made is concerned, is hearsay so far as the defendant Berg goes.

The Court: Your objection is as to Berg. The Court will advise the jury now that any conversations to be related here wherein the defendant Berg was not present would not have any binding effect upon the defendant Berg.

Mr. Guterson: I can ask him that.

By Mr. Guterson:

Q. (Continuing): During December, 1954 when you were at Mrs. Heller's home was Mr. Berg present or not? [219] A. No, sir.

Q. Now, during that month when you were at Mrs. Heller's home was there anyone present besides yourself and Mrs. Heller?

A. The two children.

Q. I see; were they in the room with you?

A. At times.

Q. All right; now, during that month did you have any conversations with Mrs. Heller?

A. Yes, sir.

(Testimony of Robert McSharry.)

Q. Would you tell us what you said and what she said?

Mr. Kosher: If your Honor please, again I object on the ground it is immaterial. There is no showing that at the time Mrs. Heller knew Mr. Berg. It couldn't be germane to any issue in this case.

Mr. Volinn: I will also object so far as time is concerned. This particular conversation is a little remote. There is no showing at all that the conversations relate to the crime alleged.

The Court: Are you in some way able to identify the nature of the conversation or give the witness the nature of the conversation you are referring to?

Mr. Guterson: I can if that would be proper. I would be glad to do that. [220]

The Court: Well, if counsel are inviting a more specific——

Mr. Kosher (Interposing): That is right.

The Court (Continuing): —— a more specific conversation——

Mr. Guterson (Interposing): All right.

By Mr. Guterson:

Q. (Continuing): During December 1954, when you were at Mrs. Heller's home and Mr. Berg was not there, when she had a conversation, between yourself and Mrs. Heller, did you ever have any conversation with her with regard to prostitution?

A. I think that——

Mr. Volinn (Interposing): I will still object on

(Testimony of Robert McSharry.)

the grounds that any conversation he may have had with Mrs. Heller with respect to prostitution in December 1954, or January, 1955, don't have—it is remote in time and doesn't have any relationship or relevancy to this particular proceeding here.

The Court: The question of remoteness may or may not have a bearing. The mere passage of time and the fact that the conversation may have been in January or December preceding the date here in the indictment, namely April, 1955, the mere lapse of time in and of itself is not sufficient to make it remote. [221]

By Mr. Guterson:

Q. Did you have any conversation with Mrs. Heller concerning prostitution?

A. Yes, sir, we did.

Q. All right. Now will you say what you said and what she said, or the gist of it, as best you can remember, Mr. McSharry.

A. I think it was brought up—we were thinking about getting married, and she was just giving me a background.

Q. What did she say and what did you say?

A. Well, she said she had call girls—one,—was going to open up a house in Everett.

(Whereupon there was a brief pause.)

A. (Continuing): I mean, all conversations seemed to come out about the call girls, referred to——

Mr. Kosher (Interposing): Just a minute. I object to this on the grounds it is not responsive, and

(Testimony of Robert McSharry.)

I move his answer be stricken and the jury be instructed to disregard it.

Mr. Guterson: I think the first part of his answer was responsive, your Honor.

The Court: The last response of the witness, the last words stated, may be stricken, and the jury will disregard them. [222]

By Mr. Guterson:

Q. Did you have any other conversation with Mrs. Heller, or were you present when she conversed with anyone else or spoke to anyone else with regard to prostitution during the month of January, 1955?

Mr. Kosher: I object to that on the grounds it is immaterial and further on the grounds there is no proper foundation laid.

The Court: Objection overruled.

By Mr. Guterson:

Q. (Continuing): Do you understand the question? A. Yes. I can answer?

Q. Yes.

The Court: This is the month of January?

Mr. Guterson: Of 1955.

The Court: In Mrs. Heller's home?

Mr. Guterson: In Mrs. Heller's home.

By Mr. Guterson:

Q. (Continuing): With just the two of you present, and not Mr. Berg.

A. Well, every trip—

Q. (Interposing): Just in January.

A. It is the same as any other trip.

(Testimony of Robert McSharry.)

The Court: The question is, Mr. McSharry,—the question is as to a conversation held in January,—at [223] that time. Now, you have to be responsive to the question.

Now, if you have no recollection of any particular conversation, or any particular meeting, you can't testify.

A. (Continuing): Well, on one occasion there was conversation made where Vicky had told this party on the phone that she had two new girls in town.

Mr. Kosher: Just a minute. I object to this on the ground it is not responsive.

Mr. Guterson: I asked for any—

Mr. Kosher (Interposing): There is no time or place fixed for this conversation.

Mr. Guterson: All right.

The Court: Just a moment. The time has been fixed as in January at Mrs. Heller's home—January, 1955; is that correct?

Mr. Guterson: Yes, sir.

The Witness: Yes, sir.

The Court: You said "on one occasion." Can you fix a time any more definitely than January; the day, or early in January or late in January?

The Witness: Late in January, sir.

The Court: I beg pardon?

The Witness: Late in January.

The Court: Yes.

Mr. Guterson: All right. [224]

(Testimony of Robert McSharry.)

By Mr. Guterson:

Q. Now, was this at Mrs. Heller's home?

A. Yes, sir.

Q. And do you recall what room in the home you were in? A. The bedroom.

Q. And who was present in the bedroom?

A. Myself and Mrs. Heller.

Q. Yourself and Mrs. Heller? A. Yes.

Q. Now, were you talking to Mrs. Heller, or was Mrs. Heller talking on the telephone?

A. Mrs. Heller was talking on the telephone.

Q. All right. Tell me what Mrs. Heller said.

A. That she had two new girls in town, and that this party should try them; that they were very good.

Q. Now, did you see the defendant Victoria Heller when your ship docked in Seattle again on April 15, 1955? A. Yes, sir.

Q. Do you remember where the ship docked?

A. Pier 39.

Q. What day was that?

A. The 15th of April.

Q. And was that in the day time or night, that you came in? [225]

A. In the day time—in the morning.

Q. Did you remain on the ship for a while?

A. Yes, sir; until the ship was cleared.

Q. Now, during the course of that day, Friday, April 15th, did you speak on the telephone with Mrs. Heller? A. Yes, sir.

Q. Did you call her, or did she call you?

(Testimony of Robert McSharry.)

A. I am not sure which.

Q. What was the conversation; what did she and you talk about?

A. Oh, about having a good trip, and explained that I had the four to midnight watch, and I would see her after watch.

Q. That would be midnight of the 15th?

A. That is right.

Q. Now, on the last trip that you took on the boat during March and April, 1955, was Mr. Berg on that trip?

A. No, the last trip he was not.

Q. Now, did you have—did you see Mr. Berg on Friday, April 15, when you arrived in Seattle?

A. Yes.

Q. And where did you see him first?

A. Right by the gangway.

Q. About what time was that, sir?

A. Well, it was in the morning. [226]

Q. The morning of the 15th?

A. Possibly around noon.

Q. Did he come down there to see you, or what?

A. I think he came to see somebody else, and to get his clothes.

Q. Were there other people on the ship that he had known when he had been aboard?

A. Oh, yes, sir.

Q. Now, did you have to stand a watch that day? A. No; just arrival, is all.

Q. When did your duty end?

A. As soon as the ship was cleared.

(Testimony of Robert McSharry.)

The Court: As soon as the ship was cleared?

The Witness: Yes, sir; Immigration and Customs.

By Mr. Guterson:

Q. Did you stay on the ship that evening and night until midnight?

A. I was off. Mr. Berg was going to give me a ride uptown if I waited until he conducted whatever business he had on the ship, but I think I went off and had a few drinks and came back to stand watch.

Q. That was from four in the afternoon until midnight?

A. From four in the afternoon until midnight.

Q. What did you do at midnight, when you got off watch? [227]

A. Mr. Berg picked me up at the ship—Pier 91—and——

Q. (Interposing): Where did you go?

A. I went to the Sportsman's Bar.

Q. You and Mr. Berg? A. Yes, sir.

Q. Did you meet anyone at the Sportsman's Bar? A. Just the same bartender.

Q. How long did you stay there—do you remember?

A. I think we just had one drink because we had to move on.

Q. Where did you next go?

A. Northern Lights.

Q. This is you and Mr. Berg?

A. No, excuse me—we went to—we had the one drink there, I think; just one drink.

(Testimony of Robert McSharry.)

Q. At the Sportsman?

A. At the Sportsman; and then went to the Northern Lights to meet Vicky.

Q. When you say "Vicky," you mean Victoria Heller, the defendant? A. Yes, sir.

Q. Did you meet her at the Northern Lights?

A. Yes, sir. [228]

Q. Was anyone else from your ship with you at the time? A. No, sir.

Q. Did you meet Mr. Busby that night?

A. Yes, sir.

Q. Where was that?

A. Back at the Sportsman's. We went from the Northern Lights back to the Sportsman.

Q. Is Mr. Busby a shipmate of yours?

A. He was then, yes, sir.

Q. All right. Your party, when you returned to the Sportsman, was Mr. Busby, yourself, Mr. Berg and Mrs. Heller, is that right, sir?

A. Yes, sir.

Q. Where did you go from the Sportsman?

A. We went to the Florence Hotel, where I picked up two bottles of Scotch.

Q. Then where did you go?

A. The Stork Club.

Q. While you were at the Stork Club, how long would you estimate you stayed at the Stork Club?

A. At least one hour.

Q. That is here in Seattle? A. Yes, sir.

Q. While you were there, did you dance with Mrs. Heller? [229] A. Yes, sir.

(Testimony of Robert McSharry.)

Q. And did you have any conversation with Mrs. Heller? A. Yes, sir.

Q. What did you say to her?

A. I thought that Busby was paying too much attention to her, and asked her if she would get a girl for Busby.

Q. What did she say?

A. She said she would.

Q. Did you have any further conversation with her a few minutes later while still at the Stork Club?

A. Yes, sir. I asked her to get a girl. They were talking about going out to the house to continue the party.

Q. Yes.

A. And so she went to the telephone and evidently called.

Q. Did she talk to you when she came back?

A. Yes.

Q. What did she say?

A. She said there would be a girl for Busby.

Q. Did you have a conversation, any conversation while you were at the Stork Club with Mrs. Heller with regard to Rose West? [230]

A. I think I had asked who was at the house, and she said Ted's wife was at the house.

Q. Vicky said Ted's wife was at the house?

A. Yes, sir.

Q. Where did you and Mr. Busby and Mr. Berg and Mrs. Heller go when you left the Stork Club?

A. Went to Vicky's house on Mercer Island.

(Testimony of Robert McSharry.)

Q. This is the same house you had been at on previous occasions? A. Yes, sir.

Q. When you arrived at Mrs. Heller's residence, did you meet a girl named Rose West?

A. Yes, sir.

Q. Was she there already?

A. She was there already.

Q. Who else was there when you arrived?

A. Mr. Pearce.

Q. Was he a shipmate of yours also?

A. Yes, sir.

Q. Now, after—what time would you estimate you four people arrived at her home?

A. Well, it must have been around three, I would say.

Q. In the morning? A. Yes, sir. [231]

Q. What did you do after you got there?

A. Well, everyone was drinking, mixing drinks, and dice games started, and I asked Vicky—I had asked Vicky, still thinking that this girl wasn't going to be at the house like Vicky said. We had been there approximately one-half hour, at least, to one hour; and this girl—I kept asking Vicky where this girl was, and Busby—

Q. (Interposing): What did Vicky say?

A. She said not to worry about it; that the girl was coming.

Q. Did another girl arrive that night?

A. Another girl arrived in a cab.

Q. Do you remember what her name was?

A. Her name was Bonnie.

(Testimony of Robert McSharry.)

Q. Was she introduced to you as such?

A. As Bonnie.

Q. About how long—how late did you stay up?

A. It must have been around five, I guess.

Q. Then what did you do?

A. I went to bed.

Q. In what room, do you remember?

A. In the back bedroom.

Q. After you went in the back bedroom, did you have any further conversation, or did you see Mrs. Heller again?

A. Yes, sir; she came in just before I fell asleep. [232]

Q. Did she say anything to you? A. Yes.

Q. What did she say?

A. She said that I had to pay Bonnie. Bonnie had to be paid \$25.00 if she was going to stay for the night.

Q. What did you respond to that?

A. I got rather mad because we had an understanding that anyone that came with me, that I asked Vicky to get dates for to go out and dine and dance——

Mr. Kosher: Just a minute, if your Honor please. I will object to this as immaterial.

The Court: The last part of the witness's testimony may be stricken.

Mr. Guterson: Yes, your Honor.

The Court: And the jury will disregard it.
By Mr. Guterson:

Q. Just what you said to Vicky on this occasion.

(Testimony of Robert McSharry.)

What you said to her—the words you used, as best as you can remember, Mr. McSharry.

Mr. Kosher: Furthermore, if your Honor please, it is hard to see the relevancy, if this man wanted a date for one of his buddies, it wouldn't have any relevancy here unless it was a date to commit an act of prostitution, so far as I can see here. The innuendo, I realize, is very bad, but apparently she was just getting a date for one of his buddies. [233]

The Court: Well, the conversation is—the testimony from this witness as I have it here is that when she came in she told him he would have to pay \$25.00 to Bonnie. That was the statement made by the defendant, allegedly by the defendant Heller.

Mr. Guterson: Correct.

The Court: The question now is: What was his response to that?

Mr. Guterson: Yes; exactly.

The Court: I don't know whether it is material or not, but I assume counsel represents it to be such.

Mr. Guterson: Yes, I do, your Honor.

The Court: All right.

By Mr. Guterson:

Q. (Continuing): Do you remember the gist of what you said to Mrs. Heller? A. I was mad.

Q. What did you say?

A. Mrs. Heller told me that that was the only way that Bonnie would stay, and I told her that any friend of mine wasn't supposed to ever be charged for being with a girl, that it was just regular parties they would be on.

(Testimony of Robert McSharry.)

The Court: Remember, this is what you said.

Mr. Guterson: Yes, I think that is what he is saying. [234]

By Mr. Guterson:

Q. That is what you said, is it sir?

A. Yes, sir.

Q. Go ahead. Did you say anything more?

A. Yes, sir. I told her to—I didn't want the party to break up, so I told her not to let Busby know, and to go into my pants pocket and get a fifty dollar bill I had there, and give it to Bonnie—give the \$25.00 to Bonnie.

Q. Now, after that, did you go to sleep, Mr. McSharry? A. Yes, sir.

Q. About what time did you awaken?

A. Oh, probably between ten and eleven.

Q. In the morning—Saturday morning?

A. Yes, sir.

Q. All right. Did you get up?

A. Not right away. I heard some yelling going on out in the front room.

Q. Did you get up in a few minutes?

A. In a few minutes I got up.

Q. What room did you walk into?

A. I walked into the kitchen. It is a big room with just a small partition there.

Q. Who was present in the kitchen? [235]

A. Ted Berg; Mrs. Heller was in the kitchen, and Rose was sitting at the dining room table.

Q. Rose West? A. Yes.

Q. Was anybody speaking—was anyone talking?

(Testimony of Robert McSharry.)

A. Mrs. Heller was doing the majority of the talking.

Q. Do you remember the gist of what she said?

A. Well, I tried to find out, but people were pretty mad at that time.

Q. What was Mrs. Heller saying—the gist of it?

A. It was something about \$50.00 being missing, and Rose was being accused of having the \$50.00, and they were trying to get her to give the \$50.00 back.

Q. Where did you say Rose was sitting when you came into the room?

A. At the dining room table.

Q. Was Mr. Berg in the room also?

A. Yes, sir.

Q. While Mrs. Heller was talking to Miss West, did you have any conversation with Mr. Berg?

A. Yes, sir.

Q. What did you say to him?

A. Well, I had remarked to him that I thought it was—how he could stand there let the abusive language that was being used against his wife—

Q. (Interposing): What did Mr. Berg say?

A. Well, she was just a tramp from Frisco.

Q. Following this Saturday, April 15th, did you ever have any further conversations with Mrs. Heller, within the next week thereafter?

A. Yes, sir. I think I had a conversation with Vicky out at Nifty's. I called her on the telephone.

Q. What is Nifty's?

A. That is a little bar over on Harbor Island.

(Testimony of Robert McSharry.)

Q. Is that where your ship was?

A. Yes, at the time.

Q. Did you meet her there?

A. At Nifty's, yes, sir.

Q. All right. What was your conversation; what did you say and what did she say, as best you can remember?

A. Well, a couple of days after this party had happened I was told by Mr. Busby—

Q. (Interposing): No.

The Court: Just a minute.

Mr. Kosher: Object to that on the ground it is hearsay.

The Court: The response to the question is stricken and the jury will disregard it.

Your question is: What was said between you and Mrs. Heller? [237]

By Mr. Guterson:

Q. (Continuing): Just what you and Mrs. Heller said to one another.

A. I told Mrs. Heller that—I asked her what was the idea of Busby's paying \$50.00 to Bonnie, and I was mad about it.

Q. What did she say?

A. She told me just to forget the whole thing—"just forget you ever saw Bonnie."

Q. During May of 1955 did you have any additional conversation with the defendant, Mr. Berg?

A. Yes, sir.

Q. All right. Now, where was it, if you remember?

(Testimony of Robert McSharry.)

A. I don't know whether it was the Firelight Room or Fireside Room at the Moore Hotel.

Q. Was Mrs. Heller present or not?

A. No, sir.

Mr. Kosher: I will object to this conversation so far as Mrs. Heller is concerned.

The Court: Any conversations, the Court will instruct the jury, that are held with one defendant without the other present are to be considered solely with respect to the defendant making the statement and to have no binding effect whatsoever on the guilt or innocence of the defendant not present.

By Mr. Guterson:

Q. What did you and Mr. Berg say to one another; what was your conversation?

A. I asked Berg how he was making out in the case he was involved in.

Q. What did he say?

A. He said it was pending.

Q. Then what did you say?

Mr. Volinn: I will object at this time. I don't see the relevancy yet. I don't see from the way this testimony is going that it is at all relevant, your Honor.

The Court: I ask counsel if it is material and relevant to the issue here involved?

Mr. Guterson: It is, your Honor.

The Court: Objection overruled. You may proceed, Mr. Guterson.

By Mr. Guterson:

Q. (Continuing): Go ahead.

(Testimony of Robert McSharry.)

A. So he said that the case was pending.

Q. Then what did you say?

A. Then I told him to—as he was involved, to save himself; that——

Mr. Volinn (Interposing): I will object and move that the answer be stricken. [239]

The Court: Is this a necessary part of the conversation, Mr. Guterson?

Mr. Guterson: No.

The Court: Well, I suggest that you omit conversation that doesn't relate to the issue here involved.

By Mr. Guterson:

Q. Well, did you say anything else?

A. Yes, sir. I told Berg that Vicky had told me that she was using him, and that was the only reason he was out at the house.

Mr. Volinn: I will move that the answer be stricken. It could mean most anything.

The Court: It doesn't strike me as being relevant, Mr. Guterson.

Mr. Guterson: Excuse me?

The Court: I don't see how this conversation has any bearing on the issues involved.

Mr. Kosher: I think it is prejudicial. I ask the Court to declare a mistrial at this time.

The Court: Motion denied. The Court will strike the last answer of the witness on the stand, and instruct the jury to disregard the questions and answers or any inference that may be drawn therefrom.

(Testimony of Robert McSharry.)

By Mr. Guterson:

Q. Do you recognize Rose West in the court room? [240] A. Yes, sir.

Q. Was her hair a different color in April when you saw her?

A. I think they call it a platinum blonde.

Mr. Guterson: I have nothing further.

Cross Examination

By Mr. Kosher:

Q. Now, your name is McSharry, is that right?

A. That is right.

Q. And you are a seaman, is that right?

A. That is right.

Q. And you have worked as a seaman for a long time? A. Yes, sir.

Q. And that is the only occupation you follow, is that right? A. Yes, sir.

Q. And when did you say you first met Victoria Heller?

A. I think it was about August in 1954.

Q. 1954; could it have been June of 1954?

A. No, I don't think so.

Q. Well, in August, then, of 1954 you say you met her, is that right?

A. July or August. [241]

Q. Did you and she start keeping company at that time?

A. She was in parties with me.

Q. I see. And did you start dating her?

A. A couple of trips later.

(Testimony of Robert McSharry.)

Q. And did you go with her pretty steadily from that time up until the time this trouble started?

A. Yes, sir.

Q. And you and she planned on getting married—isn't that right?

A. Yes, sir.

Q. In fact, this house out at Mercer Island you helped her buy, isn't that right?

A. No, sir. The house was in my name, but none of my money was involved in it.

Q. But it was put in your name, is that right?

A. Yes, sir.

Q. You didn't know her to be a prostitute, did you? You didn't know Mrs. Heller was a prostitute?

A. She told me herself—not that she was a prostitute.

Q. That is what I mean. And while you were out at her house you didn't see any prostitution carried on, did you, at any time?

A. No, sir. [242]

Q. And you knew that her two little boys lived out there with her, isn't that right?

A. That is right.

Q. And isn't it a fact that out at that house she was very, very careful how she conducted herself, because she had the two little boys there?

A. Yes, sir.

Q. And, in fact, when you visited her wasn't it understood that she wouldn't let many people come out to the house because she didn't want to involve her two babies, or two little boys?

A. That is right.

(Testimony of Robert McSharry.)

Q. And she did, you say she did tell you from time to time she did take calls over the telephone, and deliver girls out on calls; is that right?

A. Right.

Q. Now, you did go to her house some time on the—was it the 13th or 14th of April? What day was it counsel asked you about?

A. 15th of April. We docked the night of the 15th of April. The 16th would be Saturday morning we went to the house.

Q. And did Mrs. Heller come down to the boat and pick you up?

A. No. Ted Berg picked me up at the ship. [243]

Q. Ted Berg picked you up at the ship, and you went out to Mrs. Heller's house; is that right?

A. No, we went to the Sportsman.

Q. I mean, you partied around downtown, and then you went to the house, is that right?

A. That is right.

Q. Wasn't it understood when you met her that they were going to have a little party for Mr. Berg's wife to be; isn't that what you understood?

A. No, sir.

Q. You thought that Rose West was Mr. Berg's wife?

A. That is the way I was told.

Q. Did they introduce her to you under the name of Rose West or Rose Berg?

A. The way I was introduced was, "This is Rose, Ted's wife."

(Testimony of Robert McSharry.)

Q. And I gather you took it she was Mr. Berg's wife, is that right?

A. Yes, sir; that is the way it was understood.

Q. Now, did you understand that they were going to have a little party for her out at Mrs. Heller's house? A. No.

Q. You didn't understand that? A. No.

Q. But there were some boys off the ship out at the [244] house, and drinking was going on?

A. That is right.

Q. When you saw Rose, what was her condition so far as sobriety?

A. I would say everyone was drinking. I wouldn't say everyone was drunk, or anyone was drunk.

Q. What about Rose—was she sober?

A. She seemed to be.

Q. Had she been drinking? A. Yes, sir.

Q. And how much did you see her drink that night? A. Oh, two, maybe three.

Q. Then you went to bed, is that right?

A. That is right.

Q. You went in and lay down on the bed there, and you didn't see whether she drank any more or not that night, did you? A. That is right.

Q. You woke up about ten o'clock in the morning and you heard a commotion going on, is that right? A. That is right.

Q. And you heard these people accuse Rose of having stolen money from someone; is that right?

A. That is right.

(Testimony of Robert McSharry.)

Q. Did you ever hear Rose say she didn't steal it? [245]

A. All I heard Rose say was she didn't have it. She said she didn't.

Q. Did she say she had given back some of the money? A. No, sir.

Q. She didn't say that. Now, you say that a girl by the name of Bonnie came out?

A. That is right.

Q. Now, you asked Mrs. Heller to get a date for your buddy, isn't that right?

A. That is right.

Q. You didn't expect her to get a prostitute for your buddy, did you?

A. I expected a good-time girl that wanted a party.

Q. You expected a girl that wanted to have some fun, is that right?

A. I figured she was getting one of the girls that we all knew.

Q. I see; you didn't expect her to pay the girl, though, did you? A. No, sir.

Q. In other words, you expected some girl would come out and entertain your buddy for free, is that right? A. That is right.

Q. And presently a girl by the name of Bonnie came out, is that right? [246]

A. That is right.

Q. Didn't Mrs. Heller tell you that Bonnie had to get a baby sitter to take care of her child?

A. I don't recall that.

(Testimony of Robert McSharry.)

Q. And that was the reason she was late?

A. I don't recall that.

Q. And didn't she tell you Bonnie was a book-keeper downtown? A. No, sir.

Q. She didn't tell you that? A. No, sir.

Q. As a matter of fact, you knew that Bonnie was not a common prostitute, didn't you?

A. I didn't know Bonnie—period.

Q. You don't know whether she was a prostitute or not? A. No, I don't.

Q. So far as you know, she could have been a real nice girl? A. Yes, sir.

Q. Didn't Mrs. Heller tell you she was going to get Bonnie to come out on this blind date and they would have to pay the baby sitter and her taxi fare?

A. No, sir.

Q. Now, you didn't give Mrs. Heller any money to give [247] to any girl for the purpose of performing any kind of an act of prostitution, did you?

A. I gave Mrs. Heller the money to pay Bonnie for staying with Busby, instead of going back to town.

Q. Now, when you say "staying with him," you mean to entertain him out there?

A. Entertain him.

Q. You didn't see anybody go to bed out there, did you? A. No, sir.

Q. And there were no promiscuous acts of intercourse going on in that house, is that so?

A. Not to my knowledge.

(Testimony of Robert McSharry.)

Q. Now, as a matter of fact, this little party you had out there was just a dice and drinking party—is that right?

A. That is what it was, and I went to bed.

Mr. Kosher: I think that is all.

Cross Examination

By Mr. Volinn:

Q. The conversations you had with Mrs. Heller in December and January relating to call girls and prostitutes,—Mr. Berg was never present at any of those conversations? A. No, sir. [248]

Q. And you never told him about those conversations, did you? A. Not to my knowledge.

Q. Now, actually, the first time you and Berg went out——

A. (Interposing): I rightfully couldn't say.

Q. (Continuing): ——was some time in March or in April?

A. I would say March, probably.

Q. You introduced Berg to Mrs. Heller, did you not? A. No, I didn't.

The Court: Introduced who?

Mr. Volinn: Mr. Berg to Mrs. Heller.

By Mr. Volinn:

Q. Somebody else did?

A. I think he introduced himself. I wasn't there, but——

Q. (Interposing): You don't know?

A. I know the time he met Vicky, but I was in

(Testimony of Robert McSharry.)

another place, and I didn't know that Mrs. Heller was going to be where Berg went.

Mr. Kosher: Could I ask him one more question?

The Court: Are you through?

Mr. Volinn: I am finished.

The Court: Very well. [249]

Cross Examination

By Mr. Kosher:

Q. Isn't it a fact there were some hard feelings between you and Mrs. Heller some time in April of this year, just about the time this trouble started?

A. We had had spats off and on ever since I had known her.

Q. These spats of recent date were over Mr. Berg, wasn't that right? Didn't you think she was paying too much attention to him?

A. Yes.

Mr. Kosher: I think that is all.

Mr. Guterson: I have nothing further.

The Court: That is all.

(Witness excused.)

Mr. Guterson: Mr. Busby. [250]

JOHN R. BUSBY

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

(Testimony of John R. Busby.)

The Witness: John R. Busby, B-u-s-b-y. (Spelling.)

By Mr. Guterson:

Q. Will you state your full name, sir?

A. John R. Busby.

Q. What is your home address?

A. 729 Jones Street, San Francisco.

Q. What is your present occupation?

A. I am unemployed at the present time.

Q. What kind of work have you been doing during the past year? A. Seaman.

Q. What ship were you aboard?

A. The last one I was aboard was the Motor Ship North Star.

Q. What ship were you on before that?

A. The John Polk.

Q. Do you recall what period you sailed on the John Polk? [251]

A. From August, 1954, to June, 1955.

Q. As a member of the crew of the John Polk did you ever know—did you know the defendant, Theodore Berg? A. Yes.

Q. Is that where you met him—on the Polk?

A. Yes. He was in my boat crew.

Q. Did you know the man who preceded you to the witness stand, Robert McSharry?

A. Yes, sir.

Q. Where did you meet him?

A. Aboard ship.

Q. Now, during the month of April of this year, 1955, did the Polk dock at Seattle?

(Testimony of John R. Busby.)

A. Yes, it did.

Q. Do you remember what day it was?

A. It was April 15th.

Q. That was a Friday, sir? A. Yes, sir.

Q. Do you remember what you did that evening and night?

A. Well, that evening I just ran around town saying hello to friends.

Q. Did you ever meet Mr. McSharry that night?

A. Yes, about twelve or twelve-thirty at the Sportsman. [252]

Q. Do you recall who else was in the party?

A. Yes. There was Vicky Heller and Ted Berg.

Q. Had you ever met Mrs. Heller before that night? A. Yes, I had.

Q. Do you remember where Mr. McSharry, Mr. Berg, Mrs. Heller and yourself went from the Sportsman?

A. From the Sportsman up to the Stork Club.

Q. Here in Seattle, a night spot?

A. Yes, sir.

Q. What did you do there?

A. Drank and danced.

Q. Did you dance with Mrs. Heller?

A. Yes.

Q. Do you remember where you went after you went—after you left the Stork Club?

A. From the Stork Club we went out to Vicky's house.

Q. The house on Mercer Island?

A. Yes; the house on Mercer Island.

(Testimony of John R. Busby.)

Q. Now, do you see Rose West in the court room? A. Yes.

Q. Now, did you meet Rose West that night?

A. Yes.

Q. Where was it?

A. That was out at Vicky's house. [253]

Q. Had you ever seen her before?

A. No, I never had.

Q. Do you remember whether any other people were there when you arrived, besides Rose?

A. There was George Pearce.

Q. Was he also a shipmate of yours?

A. Yes.

Q. What did you do at Mrs. Heller's house after you arrived?

A. Sat around and drank for a while, and then a crap game started.

Q. Besides Mrs. Heller and Miss West, were there any other women there when you arrived?

A. Not that I can recall.

Q. Do you recall whether or not any other woman came after you arrived? A. Yes.

Q. And about how long were you there, would you say, before any other woman arrived?

A. It must have been about one hour.

Q. Do you recall who it was that arrived?

A. A girl named Bonnie.

Q. About what time did you go to sleep, if you remember?

A. Oh, it must have been four or five o'clock in the morning. [254]

(Testimony of John R. Busby.)

Q. Did you sleep there that night? A. Yes.

Q. Do you remember what room it was?

A. The bedroom.

Q. About what time did you wake up?

A. Well, it must have been about ten-thirty or eleven o'clock.

Q. Saturday morning?

A. Saturday morning, yes.

Q. Did you get up? A. Yes.

Q. Do you remember where you went? Did you stay in the house, or go in some other room?

A. I got up and went into the bathroom to wash my face.

Q. Who was present in the house, do you remember, after you got up?

A. Well, there was Ted Berg, Vicky Heller, Rose West, Bob McSharry was there, and I believe Bonnie was there.

Q. What did you do after you washed up?

A. Well, when I was in the bathroom Ted came into the bathroom with my wallet and some money in his hand.

Q. Did Mr. Berg say anything to you? [255]

A. He asked me if that was my wallet, and I said yes, and he asked me to count the money, and I did, and he asked if it was all there, and I didn't know how much I had spent the previous evening.

Q. Had you been drinking pretty heavily?

A. Yes, I had.

Q. After you went out of the bathroom, where did you go?

(Testimony of John R. Busby.)

A. I went into the dining room.

Q. Do you remember who was there?

A. Rose West was there.

Q. Anybody else?

A. Well, Rose West and Berg, and I believe McSharry was there.

Q. Was Mrs. Heller there? A. Yes.

Q. What happened there?

A. Well, Rose was sitting at the dining room table, and they were accusing her of having taken my money. I can't remember her saying anything to it, whether she—she neither admitted it nor denied it.

Q. Now, was this girl who had arrived during the night before, Bonnie, was she still there at the house? A. Yes.

Q. Had you recovered your money by this time?

A. Yes.

Q. You had all your money——

A. (Interposing): Yes.

Q. (Continuing): ——what Mr. Berg had given back to you, is that true? A. Yes.

Q. You were not sure it was correct, but whatever it was? A. Whatever it was.

Q. Did you pay out or use any of your money from then on?

A. Bonnie had told me she was broke, so I gave her \$50.00.

Q. Did you have any other relationships with Bonnie?

(Testimony of John R. Busby.)

A. It was about, I guess, ten or fifteen minutes later I propositioned her.

Q. Did you have intercourse with her?

A. Yes.

Q. Was that while Mr. Berg and Mrs. Heller were in the house? A. I believe so, yes.

Q. Now, about what time did you leave the home?

A. It must have been about one-thirty or two o'clock.

Q. Where did you go?

A. They drove me downtown. [257]

Q. Who drove you? A. Ted Berg.

Mr. Guterson: I have nothing further.

Cross Examination

By Mr. Kosher:

Q. Now, you had been drinking, isn't that right?

A. Yes.

Q. Isn't it a fact that you and Bonnie went downtown? A. Yes.

Q. And——

A. (Interposing): The next day.

Q. And isn't that where you had this act of intercourse with her?

A. No, it was out at the house.

Q. Do you remember where you had it?

A. It was out at Vicky's house.

Q. Did you ever tell anybody you had propositioned Bonnie on the way home? A. No.

Q. You don't remember that? A. No.

(Testimony of John R. Busby.)

Q. Now, did you give her this money for the purpose of committing an act of prostitution?

A. No, I didn't.

Q. Why did you give her this \$50.00?

A. She said she was broke, and I was very grateful for having my money back and returned to me, so I felt like doing something for somebody.

Q. Now, did you hear Rose West say she had not stolen the money?

A. I didn't hear her say anything.

Q. You didn't hear her say anything?

A. Not in my presence.

Q. Did you hear her accused?

A. I heard her accused.

Q. Did Mrs. Heller apologize to you for the fact somebody had tried to steal some money at her house?

A. Yes, she did.

Q. And did she remonstrate with this girl about it?

A. Yes, she did.

Q. Did you hear her tell the girl she would have to leave?

A. I believe she said something like that.

Q. Did you hear her say she didn't want any thief in her house?

A. Yes.

Q. Now, what was Rose West's condition, insofar as sobriety was concerned, each time you saw her? [259]

A. She appeared to have been drinking very heavily.

Q. Would you say she was intoxicated?

A. Yes, I would.

(Testimony of John R. Busby.)

Q. And did she give signs of being intoxicated?

A. Yes.

Q. Now, when you first met Mrs. Heller, did you know her to be a prostitute?

A. No, I didn't.

Q. Did you ever know her to be a prostitute?

A. No.

Q. Even as you sit in this court room, do you know of your own knowledge that this woman has ever been a prostitute? A. No.

Q. Have you ever known her to solicit girls for the purpose of prostitution?

A. Not to my knowledge.

Q. Had you been out to her house on a number of occasions with Bob McSharry?

A. I had been out there once before in the afternoon.

Q. What kind of a place was it you went to?

A. It was a private home.

Q. How did Mrs. Heller conduct herself at that house?

A. As anyone would at their home.

Q. Did you see her little boys out there? [260]

A. Yes.

Q. Did you see any young girls going in and out of bedrooms while you were there?

A. No.

Q. Did you see any men coming and going?

A. No.

Q. Did you see anything in that house that would indicate to you that it was being conducted

(Testimony of John R. Busby.)

as a house of prostitution? A. No, I didn't.

Mr. Kosher: You may inquire.

Cross Examination

By Mr. Volinn:

Q. The fifty dollar bills returned to you—you were returned a fifty dollar bill? A. Yes.

Q. Who handed them to you?

A. Ted Berg.

Q. They were wet, weren't they?

A. Yes, they were.

Mr. Volinn: That is all.

Mr. Guterson: I have nothing further.

The Court: That is all.

(Witness excused.)

Mr. Guterson: Mrs. Keating. [261]

MARGARET KEATING

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name, and spell your last name, please?

The Witness: Margaret Keating. K-e-a-t-i-n-g. (Spelling.)

By Mr. Guterson:

Q. Will you state your full name, please?

A. My name is Mrs. Margaret Keating.

(Testimony of Margaret Keating.)

Q. Will you speak up, so that everyone can hear you?

A. I am Mrs. Margaret Keating.

Q. What is your home address?

A. 4134 84th Southeast, Mercer Island.

Q. Have you ever seen the defendant, Victoria Heller, before today? A. Yes, I have.

Q. And where does she live in relation to where you live? A. She lives on the left of us.

Q. Right next door?

A. Right next door. [262]

Q. How long have you lived at your present address?

A. We have been there three and one-half years.

Q. Are you married? A. Yes.

Q. What does your husband do?

A. My husband is an airline pilot.

Q. For whom?

A. For Pacific Northern Airlines.

Q. Do you have any children?

A. I have four children.

Q. How old are they?

A. The oldest is twelve. There is an eleven-year-old, a seven-year-old, and a five-year-old.

Q. And are they boys or girls?

A. The older ones are boys and the younger ones are girls.

Q. Do they attend school here? A. Yes.

Q. Where is that?

A. Mercer Crest School.

(Testimony of Margaret Keating.)

Q. How long have you lived at your present address? A. Three and one-half years.

Q. Do you remember approximately when it was Mrs. Heller moved in next door to you?

A. It was some time in November. [263]

Q. What year? A. Last year.

Q. 1954? A. Yes.

Q. Does Mrs. Heller have two boys?

A. Yes, she does.

Q. How old are they?

A. There is a thirteen-year-old, and an eight-year-old.

Q. Have you seen them on many occasions?

A. Oh, yes.

Q. Now, during the period between November 1954 and mid-April, 1955, would you generally be home in the evenings and at night time with your family? A. Yes.

Q. Now, as such, did you have occasion to observe people coming or going to Mrs. Heller's home?

A. Yes, I did.

Q. How would you, in your own words, describe the traffic there?

Mr. Kosher: Just a minute. I object on the ground it is incompetent, irrelevant, and immaterial.

Mr. Guterson: Your Honor, on the cross examination of the last witness Mr. Kosher opened this very subject, [264] and I think we have a right to go into it with this witness. She is a next-door neighbor.

(Testimony of Margaret Keating.)

He asked the other witness whether he saw girls running in and out.

The Court: Objection overruled.

By Mr. Guterson (Continuing):

Q. You may answer, Mrs. Keating.

A. Well, the traffic during the day—we didn't notice much traffic during the day, but at night there was quite a bit of traffic coming and going in that house.

Q. By cars, would it be?

A. Car and cab.

Q. And how late at night would this be?

A. Well, all night; all night.

Q. How often—how many times a week, as best you can approximate?

A. Well, I was conscious of it almost every night.

Q. I see. Now, you were still living at the same place next to Mrs. Heller on Saturday, April 16th, 1955, is that not right? A. Yes.

Q. Now, before—prior to that date, April 16th, have you ever seen Rose West? A. No.

Q. Prior to that date, April 16th, had you ever seen Theodore Berg? [265] A. No.

Q. On April 16 did you see Rose West?

A. Yes.

Q. What were the circumstances of your meeting her? A. She came to my door.

Q. Do you recall what time this was?

A. Some time between eleven and eleven-thirty.

Q. In the morning? A. In the morning.

(Testimony of Margaret Keating.)

Q. She came to your door?

A. She came to my door and she was in a——

Q. (Interposing): How was she dressed?

A. She had a white sweater and a gray skirt and no stockings, and some high-heeled pumps.

Q. Did you let her in your home?

A. She asked me to.

Q. Did you let her in? A. I let her in.

Q. Do you know where she first went in your house?

A. She stood there talking to me for a moment, and then she heard someone at the door and she was frightened and ran in my bathroom.

Q. Did you answer your door again?

A. Yes. [266]

Q. Who was it that was there?

A. It was the man in the tan shirt.

Q. Mr. Berg? A. Mr. Berg.

Q. You didn't know his name?

A. I didn't know who he was.

Q. What did the man in the tan shirt that you now recognize in the court room say to you?

Mr. Kosher: I object to that on the grounds it is hearsay as to the defendant Heller.

The Court: Again the Court will advise the jury, as I have on a number of occasions before, conversations with respect to one defendant when the other one was not present is not binding on the defendant not there. You may proceed.

By Mr. Guterson:

Q. (Continuing): You may answer.

(Testimony of Margaret Keating.)

A. He said, "Did my wife come here, — a little blonde girl?"

Q. What did you say? A. I said, "No."

Q. And what did he do?

A. He went off looking for her.

Q. Was Miss West in your house all this time?

A. Yes. [267]

Q. All right. How long did she stay there?

A. She was there until about twelve-thirty.

Q. And where did she go, or where did you go?

A. I took her down town to a hotel.

Q. Do you remember whether or not you gave her any money? A. Yes, I did.

Mr. Kosher: I will object to this on the grounds it is not material.

The Court: It seems not to be material. Well, I don't know, under the circumstances. I will withdraw the Court's ruling and the question may stand. By Mr. Guterson:

Q. Do you recall whether or not you gave her any money? A. Yes.

Q. Do you recall how much money you gave her?

A. I gave her a twenty dollar bill.

Q. Do you recall where you took her?

A. I took her down by the Stewart Hotel.

Q. Now, did you speak at all to Miss West again that day over the phone? A. Yes.

Q. Did you call her, or did she call you?

A. I asked her to call me when she found out how she [268] could get home and get the money and to let me know.

(Testimony of Margaret Keating.)

Q. Did she call? A. She did call me.

Q. That day? A. Yes.

Q. Now, as of this date, Saturday, April 16, 1955, had Mrs. Heller ever visited you at your home? A. No.

Q. Following that date did Mrs. Heller ever visit you at your home? A. Yes.

Q. About how long after April 16th would you estimate that to be?

A. Well, it was just two days before the other hearing.

Q. A couple of weeks into May?

A. It was in May, or June.

Q. Was Mr. Berg present? A. No.

Q. All right. Did Mrs. Heller come into your home? A. Yes.

Q. Do you remember whether that was in the day time or evening? A. It was at night.

Q. Who was present? [269]

A. My children were all asleep.

Q. Then who was present?

A. Just Mrs. Heller and I.

Q. Your husband was away?

A. My husband was expected home about ten o'clock.

Q. About what time did Mrs. Heller come to your home? A. She came about nine o'clock.

Q. What did Mrs. Heller say to you?

A. Well, she asked me first if Rose West had come to my house, and I told her yes, she had.

(Testimony of Margaret Keating.)

Q. Was this in reference to Saturday, April 16th? A. Yes.

Q. What did you tell her?

A. I told her yes, she had.

Q. What did Mrs. Heller say?

A. She asked me in what condition I had found Miss West.

Q. And your response was what?

A. I told her she was very hysterical and disheveled, and that she told me what they had done to her over there, and she was frightened, and wanted my protection, and I told her what I had done with her, and had given——

Q. (Interposing): What did you tell her?

A. May I tell?

Q. Yes. [270]

A. I told her that she told me everything that had been done to her, and that she had—they had been——

Mr. Kosher (Interposing): I object to this on the ground it is immaterial. Conversation of this nature doesn't have any bearing on the issues in this case.

The Court: It would seem to be immaterial, this part of it, the details of it.

Mr. Guterson: All right.

By Mr. Guterson:

Q. After you told Mrs. Heller that Miss West had come to your home, what other conversation did you have with Mrs. Heller?

A. I told her I was surprised she would have

(Testimony of Margaret Keating.)

Miss West there with her small children, and I had gotten quite an impression of what had been going on in that house.

Q. What did Mrs. Heller say?

A. She explained that Miss West had come up here to marry a friend of hers, and she had just kept her there as a favor to this friend, to whom she was to be married.

Q. I see. Did Mrs. Heller or yourself say anything more with regard to Miss West?

A. Oh, yes; she said she was an alcoholic, and had exposed herself to the landscape gardener, and she told me she had, on the way down with the United Air Lines, that she had had intercourse with the pilot, and things of that [271] sort.

Q. This is Mrs. Heller talking to you about Miss West?

A. Yes.

Q. Did she explain to you in any way the reason why she had her at her home?

A. Just as a convenience to Mr. Berg.

Q. Did you inquire, or did you have any conversation with Mrs. Heller with regard to the party that had been there that night and other nights?

A. Yes, she sort of explained that to me, because I asked what had been going on, and she said that Rose had stolen some money, and that these people that were there were friends of hers from a ship, and that they often came there to parties, and that the men trusted her implicitly with their money, and it was as safe with her as if in a bank, and that

(Testimony of Margaret Keating.)

they just had a good time, and it was just drinking, and that sort of thing; and——

(Whereupon there was a brief pause.)

Q. Did Mrs. Heller tell you whether or not she knew as to whether Miss Rose West had ever been a prostitute?

A. She told me she knew she had a record for that in California.

Mr. Guterson: I have nothing further. [272]

Cross Examination

By Mr. Kosher:

Q. You live right next door to Mrs. Heller, do you? A. Yes.

Q. You are how far away?

A. Just an ordinary one hundred foot lot, and she is my next-door neighbor.

Q. And you say you know her two little boys?

A. Yes, I do.

Q. They come over to your house?

A. They do.

Q. As a matter of fact, she sends them to Sunday School with your children?

A. We invited them to Sunday School.

Q. And the kids all went to Sunday School together, is that right? A. Yes.

Q. And you say there were cars coming and going all night long every night?

A. When I would be conscious of it. My husband is an airline pilot and he gets in at all hours, and I

(Testimony of Margaret Keating.)

would be conscious of the traffic, because I would be waiting for his car to drive in.

Q. And how many cars would you see there at one time? [273]

A. Oh, sometimes three cars at a time.

Q. But she did tell you they had a lot of parties?

A. She told me they had a lot of parties.

Q. Did she tell you she was going with a young man who was on a ship?

A. That she had been going with him.

Q. Yes. And didn't she tell you there were a lot of parties when she was going with him?

A. Yes.

Q. And she also told you, did she not, that that house was not used as a house of prostitution?

A. She didn't tell me anything about that.

Q. Didn't you ask her? A. No.

Q. As a matter of fact, it never dawned on you that your next door neighbor might have been operating a house of prostitution, did it?

A. We didn't know what she was doing there.

Q. And when you asked her about Rose West, she said Rose West had come up from California to marry a friend of hers—isn't that right?

A. Yes.

Q. And didn't she tell you she permitted her to stay at her house as a convenience to this friend of hers? A. Yes. [274]

Q. And it was Mrs. West, isn't that right?

A. Yes.

(Testimony of Margaret Keating.)

Q. Now, when Rose West came to your house, could you tell whether or not she had been drinking?

A. She was sober, but I could tell she had been drinking.

Q. Could you tell whether or not she had been affected by the drinks she had?

A. I didn't feel she was intoxicated at the time.

Q. Did you supply her with any liquor while she was in your house? A. No.

Q. Did she have any beer to drink there?

A. No.

Q. Did she ask you for anything to drink?

A. No. I gave her aspirin tablets.

Q. Did she ask for an aspirin tablet?

A. I gave it to her because she had a headache.

Mr. Kosher: I think that is all.

Mr. Volinn: I have no questions.

Mr. Guterson: Thank you, Mrs. Keating.

The Court: That is all, Mrs. Keating.

(Witness excused.) [275]

* * * * *

ALFRED G. GUNN

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

(Testimony of Alfred G. Gunn.)

The Witness: Alfred G. Gunn, G-u-n-n. (Spelling.)

By Mr. Guterson:

Q. Will you state your full name, sir?

A. Alfred G. Gunn.

Q. What is your home address?

A. 3220 109th Southeast, Bellevue, Washington.

Q. What is your occupation?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. How long have you been a member of the F.B.I.? A. Going on 16 years.

Q. Are you assigned to the Seattle office?

A. Yes, I am.

Q. How long have you been here in Seattle?

A. A little over three and one-half years.

Q. In the course of your duties as an agent with the Federal Bureau of Investigation, did you have occasion [278] to interview and speak with the defendant, Victoria Heller? A. Yes, I have.

Q. Can you tell us when that conversation came about?

A. Well, Mrs. Heller telephoned and requested to talk to me at my office, and I asked her to come down.

Q. Do you recall what date this was?

A. I talked to her on the morning of April 28, 1955.

Q. Where was this conversation at?

A. At the Seattle office of the Federal Bureau of Investigation.

(Testimony of Alfred G. Gunn.)

Q. Was anyone present besides yourself and Mrs. Heller?

A. Just the two of us during most of the interview. Another Special Agent came in and out a time or two—my partner.

Q. What was the opening conversation: what did you say to her?

Mr. Volinn: Excuse me. If I may, I will object to any binding effect——

The Court (Interposing): Are you objecting to the testimony, or do you want an instruction regarding the effect of it?

Mr. Volinn: I would like the Court to instruct the jury.

The Court: Mr. Berg wasn't present during this [279] conversation, I take it?

Mr. Guterson: No.

The Witness: No, he was not.

The Court: Again, the Court will advise the jury that the conversation—any conversation that may be testified to between this witness and the defendant Heller would have no binding effect and would not be considered with respect to the guilt or innocence to the defendant Berg if he was not present. By Mr. Guterson:

Q. (Continuing): What did you say to Mrs. Heller, Mr. Gunn?

A. I had previously known Mrs. Heller, and I advised her that anything that she told me at this time would possibly be used against her in court at

(Testimony of Alfred G. Gunn.)

a future time, and that her coming in to see me was voluntary on her part, and that she had a right to have an attorney present, if she so desired.

Q. Do you know whether or not this case was then pending?

A. She told me that she had been arrested a week or so previously by the local sheriff's department, and that she understood that the F.B.I. was going to investigate her on the same incident that caused her arrest by the sheriff's office, and that was the reason she wanted to come [280] in and talk to the F.B.I. and tell them her side of the picture before the investigation started.

Q. Did you have any conversation with regard to her meeting and association with Mr. Berg?

A. Yes, I did.

Q. What did she say?

A. She said she had first met Mr. Berg—she called him Cedric Ted Berg—and she met him in January, 1955, on a blind date.

Q. What was his occupation at that time, did she say?

A. She said he was a seaman assigned to the General Polk, and that she had been previously acquainted and going with another seaman by the name of Bob McSharry on that ship, but she and Bob had split up two or three months prior to the interview with me, and that she had met Berg about January of 1955.

Q. Did you and she have any conversation with

(Testimony of Alfred G. Gunn.)

regard to her associations with Berg during the month of March, 1955? A. Yes, we did.

Q. What was it that she said?

A. Well, she told me that she had seen Berg in clubs when the ship was in—when the Polk was in, between January, and in March; and in March when the ship left [281] Seattle, Berg didn't ship out on it, but he stayed around, and they partied in Clubs for about a week; and then he took a trip to his home at Los Banos, California, and she told me he was expected to be gone a week or ten days or two weeks, and was to call her on his return from California. She expected him back, but he didn't call, and one evening she went down to the Sportsman's Bar to inquire from the bartender as to whether he had heard from Berg, that the bartender was a friend of Berg's, and said she learned there berg had just arrived in town from Los Banos that day. She placed that date as March 28, 1955.

She told me she had conversations with Berg at that time, and that he was waiting for the ship to return, the General Polk, which was out at sea, and she made her home available, and told him he was welcome to stay at her home while waiting for the ship to come back into port.

Q. At that time was there any conversation between Mrs. Heller and Mr. Berg concerning the trip to Los Banos?

A. Only that he had been down there. She didn't tell me anything further about the trip.

(Testimony of Alfred G. Gunn.)

Q. Did she say whether or not Mr. Berg accepted her offer and came to her home?

A. Yes, she said he moved out and stayed in one of the spare bedrooms at her home.

Q. How long did he stay there, did she say?

A. She said he was still there on April 13th through 16 when other events transpired that she related to me.

Q. Did you and Mrs. Heller have any conversation on this occasion with regard to Rose West?

A. Yes, we did.

Q. What did she say?

A. She told me that Berg had told her about Rose, that Berg told her he had known Rose for about seven years, and that Rose had been a prostitute prior to the time when she had a child, about five years ago, but had not prostituted since that time.

She told me that Berg had told her that he wanted to marry her, and was thinking about buying a home in Seattle, and wanted to bring her up to Seattle and marry her. She told me that Berg telephoned Rose West.

Q. From her home?

A. From her home; and she told me that she talked to Rose during one of the telephone conversations from her home, and I think later she told me she talked two or three times during conversations Berg had with Rose West on the phone.

Q. Did she tell you what she said to Rose West during the conversations?

(Testimony of Alfred G. Gunn.)

A. She just told me she told Rose she thought she [283] would like it in Seattle, and encouraged her to come up here and that their purpose was to come up and get married to Ted.

Q. Did she indicate whether or not some of these calls were made from her phone at her home?

A. Yes, she did. She said there were two or three calls made from her home by Ted, and that she talked on some of the calls.

Q. Did she tell you whether or not Miss West did in fact come to Seattle?

A. Yes, she did. She told me during one of the calls—I think it was the first call—that while the conversation was taking place between Ted and Rose that Ted told Rose he would send her \$60.00 by Western Union. She said that after about ten days Rose West didn't arrive in Seattle, so Ted called again to inquire as to whether she got the money and whether she had spent it.

It was shortly after the second or third call that she next heard from Rose by telephone, when Rose called at Vicky's home and told Mrs. Heller that she was at the airport in Seattle.

Q. Did she come out to the home?

A. Mrs. Heller said she told Rose she didn't have a car to pick her up, and told her to take a taxicab to the home at Mercer Island, and I don't recall whether Mrs. [284] Heller told me that Rose already had the address, or whether she gave it to her on the phone at that time.

Q. Did Mrs. Heller tell you whether or not there

(Testimony of Alfred G. Gunn.)

was any conversation between herself and Miss West at the time Miss West arrived at the home?

A. Yes, she did.

Q. What was the conversation as she related it to you?

A. She told me Miss West arrived, and had been drinking heavily, and that Miss West told her that she had done a trick with the pilot of the airline coming up for \$15.00.

Mrs. Heller told me that she told Rose at the time that she shouldn't have done it, and also that \$15.00 was too cheap. She told me that at that time that she told Rose to come in and make herself at home, that she was welcome to stay there until she decided whether she was going to like it in Seattle and wanted to stay here.

Q. Did she indicate whether or not Miss West did, in fact, stay there?

A. Yes, she did say she brought her things in and stayed there.

Q. What was her narrative with regard to that day, Wednesday, April 13, 1955?

A. She told me that Mrs. or Miss West, or Rose West, [285] had arrived in the morning some time after seven or so, and that Mrs. Heller herself went back to bed until about one-thirty in the afternoon.

About one-thirty Mrs. Heller and Ted Berg left to go down town. She told me that Rose did not want to go with them. They were going down to look for a car—for a Dodge. They were trying to buy a car, and they went down to look at the

(Testimony of Alfred G. Gunn.)

Dodges; and she told me, she, herself, and Ted Berg went down town, and Rose West stayed at her home.

Q. Did she indicate what time they returned to the home?

A. She told me they returned in the evening, and she told me Rose West had killed a fifth of liquor.

Q. During that day did she tell you anything further with regard to the events of that day?

A. She told me what transpired that evening.

Q. What did she say transpired that evening?

A. Well, she said that evening there was a dice game at her house and that other individuals came during the evening, including Pat Gentile, Mike and Danny Bard, and a Sam Baker and another acquaintance of Sam's by the name of Elmer or Walter Baker.

She termed Sam Baker as a man who always carries \$5,000 on his person, and stays at the Stewart Hotel, and she was setting him up for a dice game with the other [286] boys.

Q. Was Rose there that evening?

A. Rose was at the house and Ted was at the house, also.

Q. Did she say anything further with regard to that night of April 13th?

A. Only that Sam Baker never did get into the game, and that nothing else transpired that night except the dice game, and maybe some drinking.

Q. What was her narrative with regard to the events on the following day, Thursday, April 14th?

(Testimony of Alfred G. Gunn.)

A. She told me on the 14th she and Ted—that is, Mrs. Heller and Ted—again went down town looking for new cars, this time at Oldsmobiles, and that they were gone most of the day, and returned with an Olds 88 demonstrator to try it out.

Q. Was Rose at the home that day also?

A. She says Rose stayed there, and that Rose was there when they got back in the evening.

Q. What did she tell you with regard to the events that evening?

A. She told me that the events of that evening were normal, and that they sat around and watched television, and that Ted and Rose and Mrs. Heller and the two children were at the home, and they watched television and went to [287] bed at a normal time, and nothing transpired in the way of partying, or dice or drinking, and so forth. She said at about two or three in the morning she received a phone call from a friend of hers from Alaska, a Mr. Clifford Warren from Anchorage, who said he was calling from the Stork Club in Seattle, and about six o'clock the following morning, the morning of the 15th, this Warren came to her home with Pat Gentile that morning.

Q. What did she say with regard to what happened that day, Friday, April 15th?

A. She told me that on Friday the 15th the ship, the General Polk, arrived in town, and that Ted Berg drove the Oldsmobile down to meet the ship and meet some of his buddies on the ship, and that later that afternoon, or that evening, she and Rose—

(Testimony of Alfred G. Gunn.)

that is, Mrs. Heller and Rose—and Ted Berg all went down to the Northern Lights in Seattle where they met several or some of the members of the crew of the ship, including a George Pearce, and that they were going to party, and that they were going to drive home to her home on Mercer Island, to change cars.

She didn't clarify why they were going to change cars, but that they went home to change cars; that when they got to the home George Pearce was the only seaman that had come with them earlier in the evening, and that he had been drinking heavily, and stayed at her home and went to bed; [288] and she told me that Rose also stayed there that evening with George Pearce and that Mrs. Heller and Ted returned to Seattle to meet other shipmates who were getting off the midnight watch of the General Polk.

She told me that they did meet these other shipmates, including the man she described as "Buzz," or "Buzzer," and also met Bob McSharry; and the four of them, Buzz or Buzzer, Bob McSharry, Ted Berg and Mrs. Heller went to her home at Mercer Island about two a.m. the morning of the 16th.

Q. Was Rose there at that time?

A. She told me Rose was there, and that George Pearce was there, and asleep; and that three other people had arrived between midnight and two a.m., Mike and Danny Bard, and Mike's girl friend, Barbara, and that they were there about two a.m. when she and the others arrived at the home.

(Testimony of Alfred G. Gunn.)

Q. Did she say whether or not any other woman arrived that night?

A. Later on in the morning she said another girl had come to the home, a Bonnie. She gave me the name of Bonnie to be Flo Richards. She told me Bonnie had driven out in her own car, which was a new Buick Special, and I asked her where Bonnie was, and she said at the time of the interview she was down with her mother at Clarkston, Washington, [289] and that she had previously lived in Seattle at the Walpole Hotel.

Q. What was Mrs. Heller's testimony with regard to the events that took place in her house in the early morning hours of Saturday, April 16th?

A. She told me that she, Mrs. Heller, went into the bathroom and found Rose in the bathroom with Buzz's wallet, and that she checked the wallet and found there were four fifty-dollar bills missing from it. She told me she asked Rose to give the money back, and she gave three fifty-dollar bills back and claimed she didn't have the fourth, and didn't know anything about it.

She told me Ted Berg then took one of his fifty-dollar bills and replaced the missing one in the wallet, and they put Buzz's wallet back in the bedroom where he was sleeping.

Some time an hour or so later she again found—she told me that Rose had gone into the wallet again and taken some of the money the second time. This time they asked Rose to give it back, and she told me that Rose claimed she did not have it, and that

(Testimony of Alfred G. Gunn.)

she did not produce it back for some time. She told me that Ted Berg searched the house for about one hour for it, and that they accused Rose of having it, and that at one time they had sat Rose down in the middle of the living room floor, taking some of her [290] clothes off, and that while sitting there she told me Rose spit a fifty-dollar bill out of her mouth.

Q. At any time during the course of your interview did Mrs. Heller tell you whether or not she knew Miss West had been a prostitute?

A. She told me that everybody knew—that is the way she put it—that everybody knew she was a prostitute, and that Ted had told her Rose was a prostitute when he first met her seven years ago, but that she stopped prostituting after she had her child about five years previously.

Q. Did Mrs. Heller say anything to you in this conversation you had with her with regard to her own activities in the field of prostitution?

Mr. Kosher: I object to this on the ground it is immaterial.

The Court: Will the reporter read the question?

Mr. Guterson: Whether or not there was any conversation between this witness and the defendant Heller with regard to her own activities in prostitution.

Mr. Kosher: No time and place fixed.

Mr. Guterson: During this time, March and April.

The Court: Objection overruled.

A. She told me that she did not want any pros-

(Testimony of Alfred G. Gunn.)

titution to take place at her home on Mercer Island, that she lived [291] there with her two children, and she did not want prostitution to take place there.

She did tell me that she had one regular customer that she had known for quite some time that she—that was a customer of herself; but that is the extent of what she told me about her prostitution.

By Mr. Guterson:

Q. During the course of this conversation with Mrs. Heller, did she indicate whether or not a man by the name of George Pearce was out at her home on the night of April 15th and the morning of April 16th? A. Yes, she did.

Q. Did she tell you the circumstances of where she met him?

A. Well, he is the one that went out there with them from the Northern Lights room, that when Ted Berg, Mrs. Heller and Rose had all gone down to the Northern Lights room on the night of the 15th, then they returned to her home—George Pearce returned to the home with them, and George Pearce went to bed because he had been drinking heavily, and Rose West stayed at the house, and Ted Berg and Mrs. Heller left.

She told me prior to going out to her home George Pearce had given her a fifty-dollar bill and that he still had seven fifty-dollar bills left, and three twenty-dollar [292] bills left.

She told me that the next morning after Rose West had run out of her home, or she ran out of the

(Testimony of Alfred G. Gunn.)

home about the same time as George Pearce awakened, and after she ran out of the home George Pearce checked his wallet and found some of his fifty-dollar bills were missing.

She told me George had told her that after Ted and Mrs. Heller had left that evening to come back to town, and Rose and George Pearce were alone in the house, that Rose had—this is what George Pearce told Vicky Heller—as Heller related it to me—that Rose had told George Pearce that Ted—

Mr. Kosher (Interposing): I object on the ground it is double hearsay, if your Honor please.

The Court: I don't know on what basis this would be admissible. I think you should forget any conversation she repeated.

Mr. Guterson: I think that is right.

The Court: Unless it has some bearing.

Mr. Guterson: That is perfectly right. I have nothing further.

Cross Examination

By Mr. Kosher:

Q. Now, Mr. Gunn, where did this interview take [293] place?

A. At the Seattle office of the Federal Bureau of Investigation.

Q. Did you have a stenographer there at the time? A. No, I did not.

Q. Did you take down what this girl told you when you talked to her?

A. Yes, I did, in my own notes.

(Testimony of Alfred G. Gunn.)

Q. You just made your own notes on it. Do you have the notes with you? A. Yes, I do.

Q. Could I see them, please? Did you read these notes over before you came to court?

A. Yes, I did.

Q. Was that for the purpose of refreshing your memory about what she told you?

A. Yes, it was.

Q. Before you read these notes you didn't remember what she told you, did you?

A. I took the notes for the purpose of later being able to refresh my memory as to what was said, and this conversation took place last April 28th, and I read the notes yesterday, and glanced at them again this morning to refresh my memory as to what the conversation was.

Mr. Kosher: Your Honor, might I cross examine [294] this man after recess time, so that I could look these notes over? It will take some time.

The Court: You wish to cross examine him later?

Mr. Kosher: Yes.

The Court: Any objection?

Mr. Guterson: No, I have no objection.

The Court: You will be here, Mr. Gunn.

Mr. Volinn, do you wish to cross examine?

Mr. Volinn: I have no questions.

Mr. Guterson: It is all right with me. Mr. Gunn can be in attendance this afternoon.

The Court: You have another witness?

Mr. Guterson: Yes, I do.

(Testimony of Alfred G. Gunn.)

Mr. Kosher: Then I can give him his notes back later.

The Court: You have no objection to counsel keeping your notes?

The Witness: No.

(Witness excused.)

Mr. Guterson: Mr. Crisman.

CHESTER C. CRISMAN

upon being called as a witness for and on behalf of the plaintiff and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name, and spell your last name, please?

The Witness: Chester C. Crisman, C-r-i-s-m-a-n. (Spelling.)

By Mr. Guterson:

Q. Will you state your name, sir?

A. Chester C. Crisman.

Q. What is your home address?

A. 3015 West 77th, Seattle.

Q. What is your occupation?

A. Special Agent for the Federal Bureau of Investigation.

Q. How long have you been a member of the Federal Bureau of Investigation?

A. Since June, 1942.

Q. How long have you been assigned to the Seattle office? A. Since April, 1953.

Q. In the course of your duties as a member of

(Testimony of Chester C. Crisman.)

the [296] F.B.I., Mr. Crisman, did you have occasion to interview the defendant, Cedric Theodore Berg?

A. Yes, sir, I did.

Q. Do you recall where that interview took place?

A. It took place in the County Jail here in Seattle.

Q. Do you recall the date of the interview?

A. May 12, 1955.

Q. Who was present?

A. Mr. Berg, Special Agent Dean Ralston from our office, and myself.

Q. Mrs. Heller was not present?

A. No, sir.

Q. What was your conversation with Mr. Berg with regard to whether or not he was acquainted with the defendant, Victoria Heller?

Mr. Kosher: I object to this on the ground it is hearsay as to the defendant Heller.

The Court: The Court will instruct the jury again, as I have before, that conversations testified to with only one defendant without the other defendant being present are to be considered only with respect to the defendant making the statement, and the testimony is not to be considered in connection with the guilt or innocence of the defendant not present, and the testimony is not binding in any respect upon them. [297]

The Witness: Now, would you read the question again, please?

The Court: Mr. Reporter, read the question.

(Testimony of Chester C. Crisman.)

(Whereupon, the following was read by the reporter: "Question: What was your conversation with Mr. Berg with regard to whether or not he was acquainted with the defendant, Victoria Heller?")

A. Mr. Berg said that he was acquainted with Victoria Heller, and had been since, roughly, the first of 1955.

By Mr. Guterson:

Q. Did you inquire of Mr. Berg as to where his home was?

A. Yes. He said that his usual place of residence was with his parents in Los Banos, California, but that since August, 1954, he had been shipping on M.S.T.S. vessels out of Seattle, and had been making his residence at various places in Seattle, including the home of Mrs. Heller on Mercer Island.

Q. Did you ask him whether or not he knew Rose West? A. Yes, I did.

Q. What was his response?

A. He said that he had known Rose West for from seven to ten years.

Q. And where was it that he had come to know her? [298]

A. In and around Los Banos, California.

Q. What name did he say he knew her by?

A. He knew that her name was Rose West, but he also knew she used the name Dolly, being a first name. He didn't indicate any last name to go with the Dolly.

(Testimony of Chester C. Crisman.)

Q. Did he tell you whether or not he knew what kind of work she had done?

A. Yes, he said he knew that off and on during all of this period that he had known her she had worked as a prostitute.

Q. Did you ask him whether or not he had been to Los Banos recently?

A. Yes. I asked him that, and he said that when the General Polk had docked in Seattle on the 10th of March, 1955, he had immediately gone to California, to Los Banos, to see his folks and other friends there, and had arrived, he decided, on about the 13th, and had stayed approximately two weeks, and had come back to Seattle. He didn't want to estimate the exact arrival date back in Seattle, but approximately had a two weeks' stay in Los Banos.

Q. Did he state whether or not he had known Mrs. Heller before he went down to Los Banos on his vacation?

A. Yes.

Q. When again was it he met her? [299]

A. As he termed it, it was around the first of the year, 1955, without being very specific, and we didn't press him for any exact date.

Q. After he returned to Seattle, what did he say he did?

A. He went out to live at Mrs. Heller's house on Mercer Island, and waited for the General Polk to come back to port. She was at sea, apparently, or he said she was at sea.

Q. Late March and early April?

A. Yes, sir.

(Testimony of Chester C. Crisman.)

Q. Did you have any conversation with regard to whether or not he made any phone calls to Miss West while staying at Mrs. Heller's home?

A. Yes, sir. He said that he made four telephone calls to Rose West in Los Banos. He said that he made two of them from Mrs. Heller's home, and from Mrs. Heller's telephone on Mercer Island, and two others from pay stations.

He said one of them—one of the pay stations was in a service station down along the waterfront, and another was near Pier 39, I believe, but they were both pay telephones, he said.

Q. Did he say whether or not any of the calls were made while Mrs. Heller was with him?

A. He said Mrs. Heller did not talk to Rose over [300] the telephone, but as to whether or not she was present in the house when he made the telephone calls, I don't believe that he gave us any information on that.

We asked him specifically on the other phase of it.

Q. But he said she did not talk over the phone?

A. That is what Mr. Berg told me, yes, sir.

Q. Now, did he relate to you what conversation he had with Mrs. or Miss West regarding whether or not he told her he would send her any money?

A. Yes. He told me he was urging her on all these telephone calls to come to Seattle; and he told her he would send her \$60.00, and that he did, in fact, send her \$60.00 by Western Union money order.

(Testimony of Chester C. Crisman.)

Q. What did he say was the reason he wanted her to come to Seattle?

A. Berg told me he wanted her to come to Seattle so that they could get married.

Q. Did Mr. Berg tell you whether or not he had ever discussed with or told Mrs. Heller about Rose before Rose's arrival?

A. Yes, he said he had told Mrs. Heller about Rose, and that he was urging her to come to Seattle.

Q. Did he go into any more detail?

A. That is, about his urging her to come to Seattle?

Q. About what he told Mrs. Heller concerning Rose? [301]

A. He indicated he told Mrs. Heller what Rose's occupation had been, and how long he had known her, and things of that sort.

Q. Did he state whether or not Rose West did in fact come to Seattle?

A. Yes. He said she came to Seattle on the 13th of April, 1955.

Q. Did she call when she arrived in Seattle, according to Mr. Berg?

A. He told me she came by airplane, and when she got to the Seattle airport, she telephoned the Heller house on Mercer Island, using the telephone number he said he had given her; and she, he said, had talked—that Rose had talked with Mrs. Heller, and Mrs. Heller had given her the street address on Mercer Island, and told her to come out by cab.

(Testimony of Chester C. Crisman.)

He indicated he did not talk with her on the telephone call, but was present.

Q. You are relating——

A. (Interposing): His statement to me.

Q. Regarding the call from the Seattle airport to the house?

A. That is right.

Q. Did he state whether or not that was the first time that Rose had ever conversed with Mrs. Heller? [302]

A. Well, he told me that Rose and Mrs. Heller had not talked with each other on any of the telephone calls to Rose.

I don't recall asking him specifically whether that telephone call on the 13th was the first time they had ever talked to each other.

Q. I see. Did he tell you whether or not Rose ever came out to the house?

A. Yes, he said she came out by taxi, and he and Vicky and Mrs. Heller — he and Mrs. Heller were both in the house when she arrived.

Q. And that was early in the morning?

A. Yes.

Q. Did he tell you whether or not Rose stayed at the Heller residence?

A. He stated she stayed at the Heller residence until late in the morning of Saturday, the 16th.

Q. What conversation did you have with him with regard to the events which transpired during the period of Rose's stay at Mrs. Heller's home?

A. We questioned him concerning those events,

(Testimony of Chester C. Crisman.)

and he didn't go into very much detail, other than to say in response to a specific question that to his knowledge he did not know of Rose's having participated in any prostitution activities during that period of time. [303]

He said specifically he knew that there was drinking, there were parties on almost every evening during that period, but as to any more details than that, he didn't give them to me.

Q. Did you have any conversation with Mr. Berg with regard to Saturday morning, April 16th, and Rose West's leaving the Heller residence?

A. Yes.

Q. What did he say?

A. He said that early Saturday morning a party had organized — been organized at the home, and that there were several of his former shipmates from the General Polk there. He mentioned a man named Busby. As I recall, he didn't give me Busby's first name. He mentioned a man named Pearce, and said that Pearce's first name was George, and I think—well, he mentioned there were two or three others in the party, that there was a lot of drinking, and that there was a dice game organized.

Q. Did he indicate whether or not Rose was there?

A. He indicated Rose was there, and that he was there, and that Mrs. Heller was there, and that late in the party but early in the morning hours of Saturday morning it was discovered by Mrs. Heller that money had been stolen from Mr. Busby's wal-

(Testimony of Chester C. Crisman.)

let, and that he and Mrs. Heller had figured out that it was Rose that had taken the money, and that he [304] personally replaced some of the money, and then they got some more—they got some of it back from Rose, and completed filling the wallet to its original condition, and put it back on the dresser in the room where Mr. Busby was sleeping; and that subsequently further money was missing again, and that they again accused Rose of stealing the money, and were trying to search her, and they did search the room and the whole house, and eventually got all but one fifty dollars of the money back.

Then he said Rose broke away from them and ran away, and that—and from that time on he said she hadn't been back at Mrs. Heller's house on Mercer Island.

Q. Did he indicate whether or not he stayed there any further length of time?

A. Yes, he said he stayed there until he was arrested by King County Sheriff Office deputies, and that after he made bond on that charge, he went to work over near Port Angeles, and that he had—of course, that day, just come back, and had been tried in Superior Court, or in Justice Court, rather, in King County.

Mr. Guterson: I have nothing further.

Cross Examination

By Mr. Kosher:

Q. You have been on the F.B.I. a long time, isn't [305] that right?

(Testimony of Chester C. Crisman.)

A. I have been Special Agent since June, 1942.

Q. And you have handled a lot of these Mann Act cases, is that right?

A. I have investigated quite a few, yes, sir.

Q. And you were much concerned, were you not, when you investigated this man, about determining what his intention was at the time he called this young lady on the telephone, and asked her to come up to Seattle; isn't that correct?

A. I inquired about his intentions, yes, sir.

Q. And you did that in great detail, isn't that correct?

A. I certainly asked him.

Q. Did you ask him specifically what he had in mind when he called this number in California, and asked her to come to Seattle?

A. Yes, sir.

Q. What was his answer to that?

A. He wanted her to come up so that they could be married.

Q. At that time did he tell you that when he called this young lady on the telephone that he had in mind she should come to Seattle for the purpose of engaging in some illicit prostitution? [306]

A. No, sir. He told me specifically that he wanted her to come so that they could be married; and he specifically denied that she engaged in any prostitution up here.

Q. Now, you did specifically ask him, did you not?

A. Yes, sir.

Q. (Continuing): Whether or not he had in mind when he called her on the telephone to come up here and practice prostitution?

(Testimony of Chester C. Crisman.)

A. I asked him specifically.

Q. What was his answer to that?

A. That, "No, I didn't ask her to come up to practice prostitution."

Q. Did he tell you he had sent her \$60.00?

A. Yes, sir.

Q. And did he tell you he had sent it from the Western Union office?

A. Yes, sir.

Q. Now, he did not tell you that Mrs. Heller sent the \$60.00, did he?

A. No, sir.

Q. In fact, he told you that Mrs. Heller had nothing whatever to do with the sending of the \$60.00, didn't he?

A. I don't recall asking him that specific question, whether or not Mrs. Heller had anything to do with the \$60.00. He told me he sent it, and I don't recall asking [307] whether or not he got the—where he got the money, or anything of that sort.

Q. That was his response to the inquiry where the \$60.00 came from?

A. It came from him. He said he sent it.

Q. You didn't press him as to whether or not he got any part of it from Mrs. Heller?

A. I don't recall asking him that question; no, sir.

Q. Now, did you ask him about Mrs. Heller's home out at Mercer Island?

A. Yes.

Q. Did you ask him if that was a house of prostitution?

A. Yes.

Q. What was his answer to that?

A. No.

(Testimony of Chester C. Crisman.)

Q. He told you it was not a house of prostitution, didn't he—isn't that right?

A. That is what he told me, yes.

Q. Did you ask him whether or not he knew of any act of prostitution being committed on these premises out at Mercer Island?

A. By any specific person or in general?

Q. In general.

A. I think my question was worded differently than that. I asked him whether or not it was operated as a house of [308] prostitution, and when he said no, there was no point in asking whether—the question as you phrased it to me.

Q. Now, did you ask him whether or not he had given any inducement to Rose West to come up here for the purpose of practicing prostitution?

A. Well, I can't answer that question that way, because he told me he did not have her come up here to practice prostitution. He told me that he had sent her \$60.00 so that she could come up here.

Q. Did you tell him that you had learned, or had heard from her that she had committed some acts of prostitution up here in Seattle?

A. I don't think I did.

Q. You didn't ask him that?

A. No. He indicated at the very start of our conversation that he didn't want to give us a signed statement, so that our conversation with him was merely asking questions and recording his answers to it, without pressing him unduly.

Q. Did you make notes like Mr. Gunn did?

(Testimony of Chester C. Crisman.)

A. I kept notes of my interview, yes.

Q. You have those notes, too? A. Yes.

Q. Now, did Mr. Berg tell you in this conversation he had planned on buying a house out here?

Mr. Volinn: Just a minute. I would like to object to the testimony of Mr. Berg's refusing to give a signed statement. It was unsolicited, and it might be considered prejudicial to the defendant Berg; and I would ask the Court to have that remark stricken. It was not relative or germane to the question, for one thing.

The Court: I don't think it serves any purpose.

Mr. Guterson: Whatever your Honor decides.

The Court: I think that testimony as to the defendant Berg's refusal to sign a statement may be stricken and the jury will disregard it.

By Mr. Kosher:

Q. Did you ask Mr. Berg whether or not he had ever accepted any of Rose West's earnings while she was working down in Los Banos in a house of prostitution? A. I asked him that, yes.

Q. What, if anything, did he tell you of that?

A. He said he had never accepted any of her earnings.

Q. Did he also tell you that Rose had stopped practicing prostitution, as far as he knew, just before the baby was born?

A. As I recall my conversation with him, the baby did not enter into it. He told me that she had practiced prostitution to his knowledge off and on during the entire period that he had known her,

(Testimony of Chester C. Crisman.)

which was from seven to ten [310] years, and that was the way the question was phrased, and as I recall, that was the only conversation regarding that phase of it.

Q. Now, had you interviewed Rose West before you talked to Mr. Berg? A. Yes.

Q. And had you learned that she, in fact, had not practiced prostitution for a number of years before she came up to Seattle?

A. A number of years? She had indicated to us that after her baby was born she had then practiced prostitution.

Q. Did she tell you how old her child was?

A. Yes, I am sure she did. At that time I believe it was just about the third birthday of the child.

Q. Did you tell, or ask Mr. Berg whether he knew she had not practiced prostitution in the last three years?

A. Not in those terms, no, sir.

Q. That was quite an important aspect of your investigation, wasn't it, sir?

A. Well, I didn't ask him the question in that specific term.

Q. You didn't deem it important, is that right?

A. He told me he knew that she had worked as a prostitute, and that he had not caused her to come up here to work as a prostitute, so I didn't press him on the questions.

As I indicated earlier, we took his story to us without pressing the details.

(Testimony of Chester C. Crisman.)

Q. Did he tell you in the same interview that during the years he had known Rose West he had given her practically all of his earnings as a seaman? A. No, he didn't tell me that.

Q. Did he tell you he had given her any money at all?

A. My recollection is he said he had not given her any money, although they had been on dates, and he had spent money on her.

Q. Now, with respect to these telephone conversations that he is alleged to have had with her, did he go into detail on any of those?

A. I asked him about them, yes.

Q. And he told you he had three telephone conversations? He had three telephone conversations with her from Mrs. Heller's home?

A. No, he told me he had two from Mrs. Heller's home.

Q. Two from Mrs. Heller's home; did he tell you when the first conversation was had?

A. He was unable to recall the dates except that they were probably within a ten-day period of her arrival up here. [312]

Q. Did he tell you what was said in this first conversation?

A. All he would indicate was that in general terms he was urging her to come to Seattle.

Q. Urging her to come?

A. Urging her to come.

Q. Did he say how he urged her to come?

(Testimony of Chester C. Crisman.)

A. He told her he wanted her to come up to Seattle.

Q. Is that what he told you that he told her on the telephone, "I want you to come up to Seattle?"

A. Yes, "I want you to come up to Seattle."

And he told her he would send her \$60.00. That is what he told me,—so that she could come up to Seattle.

Q. Did he say how she was to come?

A. Yes. He said that she was going to fly, that they had decided, when she was sent the \$60.00, that she was to fly up.

Q. Did he say how she was to fly up here?

A. By what air line, do you mean?

Q. Yes.

A. Not to my knowledge; not to my recollection.

Q. And you specifically recall that Mr. Berg told you that when he talked to this lady down in California that Mrs. Heller did not talk to her; isn't that right? [313]

A. Yes, sir.

Q. And he also told you that as far as he knew after she arrived in Seattle she did not practice prostitution?

A. That is what he told me.

Q. Now, did he tell you whether or not she was intoxicated during the time that she was up here—those three or four days?

A. He told me that she had been doing a lot of drinking at the house on Mercer Island, yes.

As to her exact stage of intoxication, it wasn't discussed.

(Testimony of Chester C. Crisman.)

Q. Did he lead you to believe in his conversation with you that his intentions as to this girl were honorable—is that what he conveyed to you in his conversation?

Mr. Guterson: Your Honor, this calls for a conclusion.

Mr. Kosher: I will withdraw it, counsel.

By Mr. Kosher:

Q. (Continuing): Did he tell you in so many words that his dealings with this girl during the time that he visited her in Los Banos and the time he came up here to Seattle and called her on the telephone and sent her the \$60.00, were done with an honorable motive on his part? Did he tell you that? [314]

A. Well, he told me that he wanted to marry her.

Mr. Kosher: That is all.

One other question.

By Mr. Kosher:

Q. Did he tell you they went out to look for a house? I don't know whether I asked you that or not.

A. Here?

Q. Yes.

A. No, he didn't mention going and looking for a house here.

Q. Did he say anything about buying a house on his G.I. Bill?

A. No, I am sure he didn't mention that to me at all.

(Testimony of Chester C. Crisman.)

Q. Did he say anything to you about having her baby come up here? A. No.

Mr. Kosher: I think that is all.

Mr. Volinn: I have just a few questions.

Cross Examination

By Mr. Volinn:

Q. You people went up to the County Jail May 12th last to see Mr. Berg, is that right?

A. Yes, sir. [315]

Q. You and who else?

A. Special Agent Dean Ralston from our office.

Q. And that was your own idea; he did not invite you—is that correct?

A. No, he didn't invite us.

Q. And at this time what conversation—at the time of the conversation had he been charged with any Federal crime?

A. Had he been charged with any Federal crime?

Q. Yes.

A. Yes, there was a warrant in existence for his arrest on charges of white slavery.

Q. And you went to see him pursuant to your investigation of those charges? A. Yes, sir.

Q. The charges were just made as you went out to conduct further investigation, I take it?

A. Yes. I can't tell you the exact day or date our warrant was issued, but it was issued prior to our talking with Mr. Berg at the County Jail.

Q. When you discussed the matter with him,

(Testimony of Chester C. Crisman.)

did you say to him initially that anything he told you might be held against him?

A. Yes, sir. After we had introduced ourselves and shown him our credentials, and identified ourselves, [316] we told him we wanted to talk with him about Rose West; and that he didn't have to talk with us if he didn't want to, and that anything he told us could be used against him in court, and that he had a right to have his attorney present if he so desired; and also that we would like to reduce the whole matter to writing, and have him sign it, and we would witness it.

We also warned him—excuse me—warned him about Section 1001, of Title 18 of the United States Code, which involves the furnishing of false information to government investigators in connection with official business.

Q. You did warn him there would be a penalty attached if he did not tell you the truth; and did he show that he understood what you stated with respect to this section?

A. He indicated he understood the matter we were discussing with him, about his rights and his obligations.

In fact, he said that his attorney had told him that it would be better if he did not sign anything, but that he was willing to talk with us.

Q. Do you know the name of the attorney who represented him then? It wasn't I, was it?

A. I don't believe that he mentioned the name

(Testimony of Chester C. Crisman.)

of his attorney. I wouldn't be positive. I know that it wasn't you. [317]

Mr. Volinn: I have no further questions.

Mr. Kosher: I have no further questions.

The Court: Any redirect?

Mr. Guterson: Nothing.

The Court: That is all, then, Mr. Crisman. You may be excused.

(Witness excused.) [318]

* * * * *

EDWARD L. BREEN, JR.

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Guterson:

Q. Will you state your full name, sir?

A. Edward L. Breen, Jr.

Q. And what is your address?

A. 1532 35th Avenue South, Seattle, Washington.

Q. What is your occupation?

A. I am a Special Agent with the Federal Bureau of Investigation, here in Seattle.

Q. How long have you been a member of the F.B.I.?

A. Four and three-quarter years, approximately.

Q. How long have you been located in Seattle?

A. Since April, 1952.

(Testimony of Edward L. Breen, Jr.)

Q. In the course of your duties as a Special Agent of the Federal Bureau of Investigation, Mr. Breen, did you have occasion to interview the defendant, Victoria Heller, with regard to this case?

A. I did, sir.

Q. When was that?

A. August 25, 1955. [330]

Q. Where did the interview take place?

A. At our office, 1015 Second Avenue.

Q. Who was present?

A. Myself and Special Agent Henry Blastic.

Q. And Mrs. Heller? A. Yes, sir.

Q. Was the defendant Theodore Berg present?

A. No, sir, he wasn't.

Mr. Volinn: At this point, your Honor, I will again ask that the Court invite the attention of the jury to statements made outside the presence of one of the defendants.

The Court: Again, members of the jury, it appears that conversations may be related here that will involve only one defendant. It is not to be considered by you with respect to the other defendant not present.

Mr. Volinn: Thank you, your Honor.

The Court: You may proceed.

Mr. Guterson: Thank you, your Honor.

By Mr. Guterson:

Q. On that occasion, Mr. Breen, did you have any conversation with Mrs. Heller regarding a trip that the defendant, Mr. Berg, made to Los Banos, California, in March, 1955?

(Testimony of Edward L. Breen, Jr.)

A. I did, sir. [331]

Q. Will you relate that conversation?

A. Mrs. Heller told us that Mr. Berg had left Seattle, Washington, for Los Banos, California, during the last of February or first of March and was gone approximately 16 days. He went to Los Banos to see his mother who, at that time, according to Mrs. Heller, was undergoing an operation, and that Mr. Berg, upon his return to Seattle, had hold her——

Mr. Volinn: Excuse me, your Honor. This is purely hearsay.

The Court: I suggest you may omit what Mr. Berg said if it can be done and give continuity to the statements.

A. (Continuing): Mrs. Heller advised that arrangements had been made at Los Banos for Rose West to come up to Seattle while Mr. Berg was there.

Mr. Kosher: I object to that latter statement, your Honor. It is obviously hearsay.

The Court: It would appear to be a conclusion.

Mr. Volinn: Yes, your Honor.

It is very objectionable.

Mr. Guterson: That is why we would prefer for him to relate the words Mrs. Heller told him.

The Court: Yes. I think it may be necessary for him to do it.

Mr. Guterson: I think it is, in this case. [332]

The Court: I might advise the jury in conversations with a defendant when in the course of that

(Testimony of Edward L. Breen, Jr.)

conversation that person repeats what allegedly was told to them by another defendant, that conversation is hearsay entirely as to the person who allegedly made the statement and should be ignored with respect to that defendant.

Mr. Volinn: I would like it noted that my objection stands.

The Court: In other words, is it your contention that because she happened to say something that Mr. Berg said that that makes the whole statement inadmissible?

Mr. Volinn: My basic contention is that I don't know what he is going to say, but it is hearsay and may be so prejudicial that it might be the basis for a requested mistrial.

The Court: Well, you may make such a motion if you think proper at the time. I do instruct the jury, however, that this conversation, whatever it may be, with Mrs. Heller has no effect or no binding effect whatsoever and should be ignored completely insofar as Mr. Berg is concerned.

Mr. Kosher: May the record show an objection on behalf of the defendant Heller on the ground that what the witness is attempting to relate is double hearsay?

The Court: This is a conversation with Mrs. [333] Heller, as I understand.

Mr. Guterson: Yes, sir.

The Court: And the conversation will be confined to what Mrs. Heller told this witness in the

(Testimony of Edward L. Breen, Jr.)

course of his conversation, the circumstances of which he has already related.

The objection is overruled.

By Mr. Guterson:

Q. Will you relate and tell the Court and jury what Mrs. Heller said to you with regard to the trip Mr. Berg had made to Los Banos?

A. Mrs. Heller told me that during the latter part of February, 1955, or the first part of March of that year, Mr. Berg left Seattle for Los Banos, California, to see his mother, who allegedly at that time was undergoing an operation; that upon his return to Seattle about 16 days later, he told her that arrangements had been made while he was at Los Banos for Rose West to come to Seattle.

Q. With regard to the same conversation between yourself and the defendant Victoria Heller, Mr. Breen, did you have any conversation with her regarding any telephone calls from Seattle to Los Banos, California, in the early part of April, 1955?

A. I did, sir.

Q. Will you relate that conversation? [334]

A. Mrs. Heller told me that during the first part of April Mr. Berg made numerous telephone calls from her home to Rose West at Los Banos, California, and that on at least one occasion she talked to Rose at Los Banos.

On that occasion Mr. Berg introduced her over the phone by saying, "This is Vicky," and that at that time she talked to the person on the other end of the line and said, "Why don't you come up

(Testimony of Edward L. Breen, Jr.)

here?" or words to that effect. I believe those were the words.

Q. With regard to the same conversation between yourself and the defendant, Victoria Heller, did you have any conversation with her with regard to the sending of a Western Union telegram, and the sending of \$60.00 from Seattle to Los Banos by Mr. Berg? A. Yes, sir.

Q. Will you relate that conversation?

A. During the same month, the month of April, 1955, Mrs. Heller advised me that Pat Gentile, who was at that time at her house, took Mr. Berg from her home to the Western Union office here in Seattle, where Mr. Berg sent a telegram to Rose West—a money order telegram.

Mrs. Heller further stated that Mr. Berg received \$60.00 from a friend whose name she did not wish to disclose, and that—

Q. (Interposing): A friend of hers? [335]

A. That is right.

And subsequent to that, within 24 hours, Mr. Berg received a check for \$78.00 from M.S.T.S., whereby he repaid the initial loan of \$60.00.

Q. At the time of the same conversation between yourself and the defendant, Victoria Heller, did you have any conversation with her regarding the trip and the going to her home in the early morning hours of Saturday, April 16th, 1955? By herself and Mr. Berg and others in the party?

A. I did, sir.

Q. Will you relate that conversation?

(Testimony of Edward L. Breen, Jr.)

A. Mrs. Berg stated that she, Mr. Berg, Mr. McSharry and Mr. Busby were at the Stork Club up until approximately four o'clock a.m., and that they left the Stork Club to go in her new Oldsmobile and proceeded to her home on Mercer Island; and that when they got to her home, Mr. McSharry asked her to get a date for Mr. Busby, and that she then phoned a girl by the name of Bonnie, whose true name she stated to be Flo Richards, who at that time was living at the Town House Apartments.

Mrs. Heller stated she had her telephone number, and would furnish it to me when she left our office and went home.

She further explained she knew this girl to be [336] a prostitute, and had called her on other occasions to fill dates with men, but that the girl had not been available, due to her other activities; that this was one of the last girls to be arrested for prostitution out of the Olympic Hotel in town in December or November, 1954.

She described this girl as being a blonde over in Eastern Washington who was employed in a service station and whose husband was employed by the Merchant Marine. She said the girl spoke with a southern accent, and when she left the area of Seattle went to Aberdeen, Washington, to work in houses of prostitution.

This girl—excuse me—if I may continue?

Q. Yes.

A. Mrs. Heller advised over the phone she told

(Testimony of Edward L. Breen, Jr.)

this girl she had a \$25.00 guarantee, and after telling her, this Bonnie came out to her home.

Mr. Guterson: I believe I have nothing further.

Cross Examination

By Mr. Kosher:

Q. Now, did you ever make any attempt to contact the girl who was given to you as Bonnie Richards, or Flo Richards? A. We have, sir.

Q. Were you ever able to locate her? [337]

A. No, sir. We were able, however, to identify her.

Q. You were able to identify her; did you make any notes when you talked to Mrs. Heller?

A. I did, sir.

Q. And was that after she had been charged in this court with the commission of the crime you had this conversation with her?

A. Yes, sir; the conversation was on the date of August 25th.

Q. Was she represented by counsel at that time?

A. No, she wasn't, sir.

Q. Did you tell her she ought to have a lawyer before she talked to you?

A. Yes, sir. Mrs. Heller's rights were fully explained to her at the time she entered our office and sat down for the interview.

In fact, at that time we told Mrs. Heller if she cared to have a stenographer present, we would be very happy to furnish her with a result of the interrogation. It was entirely up to herself.

(Testimony of Edward L. Breen, Jr.)

Q. Had you consulted with Mr. Gunn at the time you interviewed Mrs. Heller?

A. Mr. Gunn and I worked as partners at times here in Seattle.

Q. You knew, did you not, she had already made [338] a statement to Mr. Gunn—is that correct?

A. That is correct, sir.

Q. And that the statement she made to Mr. Gunn wasn't exactly like she made to you, is that right?

A. The main reason for Mrs. Heller coming to our office was to resolve the inaccuracies and to possibly amplify on the statement given to Mr. Gunn.

Q. At that time in that conversation with her, did she tell you that she intended for this girl West to practice prostitution in Seattle?

A. For Rose West?

Q. Yes. A. No, sir.

Q. What did she tell you about Rose West coming here to Seattle?

A. Mrs. Heller told me that the reason Rose West came to Seattle, that the reason she knew Rose West came to Seattle, was to marry Mr. Berg.

Q. And did she tell you so far as she knew Rose West didn't practice prostitution in Seattle?

A. Didn't practice prostitution in Seattle.

Q. And didn't she tell you she did not use her home as a house of prostitution?

A. That is correct, sir.

(Testimony of Edward L. Breen, Jr.)

Q. And didn't she tell you at that time that she [339] herself was not a prostitute?

A. At that time, yes, sir.

Q. Didn't she also tell you that at the time Miss West came it was expected she would bring with her her child?

A. No, sir; she did not say that.

Q. Well, now, you say that she told you that her purpose in coming to see you was because she wanted to correct some discrepancy in the story she told to Mr. Gunn?

A. No, that wasn't her purpose in coming to see me. Her purpose in coming to see me, as I understand it, was to give us a signed statement based on the oral statement she furnished Mr. Gunn.

Q. Well, now, as a matter of fact, she didn't sign any statement in your office, did she?

A. No, sir, she didn't.

Q. Isn't it a fact she told you that the reason she came to see you was that someone informed her that you had been making remarks about her two boys?

A. Previous to the phone call I received from Mrs. Heller I talked to Geraldine Scheuman, who lives at the Cliff Apartments.

Mrs. Heller called me and said she had conversed with a certain party I talked to about her children, and I explained to her that our interest lay not with her children, [340] but in proving a violation of Federal law, and that we were not interested in her children in any regard.

(Testimony of Edward L. Breen, Jr.)

Q. Didn't she tell you in this interview that whatever else she might have been in her lifetime she would not permit any prostitution to be carried on in the presence of her children?

A. I am not sure, sir, if she worded it in that way. Mrs. Heller told me there was no prostitution carried on in her home.

Q. Didn't she tell you that her two children lived with her out at that house?

A. She did tell me.

Q. Did she tell you that at no time did she send any money to Rose West to come up here on?

A. Mrs. Heller was not asked whether she sent the money to Rose West to come up here on. She was asked if she had any knowledge about the sending of a telegraphic money order to Rose West from Seattle here.

Q. Did she tell you when she gained that knowledge?

A. No, the specific time was not stated.

However, she did point out to me that on the morning that Mr. Berg sent the telegram, he was taken from her home by Mr. Gentile to the telegraph office for that purpose.

Q. Did she tell you she learned that after she was [341] arrested and after she talked to Mr. Gentile?

A. The time element was not discussed.

Q. I see. Then you don't know now whether she knew at the time she told you or allegedly told you she had knowledge whether she had it at the

(Testimony of Edward L. Breen, Jr.)

time the money was sent, or whether she learned it afterwards?

A. I only know she told me Mr. Berg was at her home and left from her home with Mr. Gentile to send a money order to Miss West at Los Banos.

Mr. Kosher: I think that is all.

Mr. Volinn: No questions.

Mr. Guterson: Nothing further, your Honor.

The Court: That is all, Mr. Breen.

(Witness excused.)

Mr. Guterson: If the Court please, at this time the government rests. [342]

* * * * *

VICTORIA RUTH FOUGHTY HELLER

upon being called as a witness for and on behalf of the defendant, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Kosher:

Q. Will you state your name, please?

A. Victoria Ruth Heller.

Q. Where do you live, Mrs. Heller?

A. At 4140 84th Southeast, Mercer Island.

Q. Would you mind telling the court reporter how old you are? A. 31 years old.

Q. And have you any children?

A. I have two children.

Q. And what are their names?

A. Donald and David.

(Testimony of Victoria Ruth Foughty Heller.)

Q. And where did these children live prior to—where did those children live in April 1955?

A. Prior to April? They—well, they lived wherever I have lived, always. We had a cottage on the beach, and I lived with my family for some time since separation from my husband.

The Court: Keep your voice up so that everyone can hear you. [396]

The Witness: Thank you.

By Mr. Kosher:

Q. Were they living with you on Mercer Island in the early part of April, 1955? A. Oh, yes.

Q. And do the children go to school there?

A. Yes.

Q. And in what classes are they?

A. The eighth grade and the fourth grade now.

Q. Now, you were born where, Mrs. Heller?

A. I was born in Rainier, Oregon.

Q. And where did you go to school?

A. I went to school in Longview, Washington.

Q. And where did you go to school?

A. I went to school in Longview, Washington.

Q. You were married to a man by the name of Pettus at one time? A. Yes.

Q. And that is Donnie's father? A. Yes.

Q. And Mr. Pettus lived in Snohomish?

A. He is a railroad man there.

Q. And that has been for many, many years?

A. Yes. [397]

Q. And you were married again? A. Yes.

Q. And he is the father of the little boy?

(Testimony of Victoria Ruth Foughty Heller.)

A. Yes.

Q. And he is in Michigan?

A. He is a business man in Michigan.

Q. Have you worked in the State of Washington?

A. I worked in a dentist's office in between my two marriages, in Dr. Goodwin's office, the dental assistant.

Q. Calling your attention to January of 1955, did you know a man by the name of McSharry?

A. Yes; I had known him since the previous June.

Q. What did Mr. McSharry do for a living?

A. He was a quartermaster on an M.S.T.S. ship.

Q. Did you keep company with him?

A. Starting in July, yes.

Q. And did you and he plan to get married?

A. Yes.

Q. And as a result of that, did you and he buy this house over on Mercer Island?

A. Yes. We were going to be married in December. We bought the house at the end of October. We bought it in his name because we were not going to occupy it as a family dwelling until we had been married. [398]

Q. During the time you knew Mr. McSharry, did you become acquainted with some members of the ship upon which he sailed?

A. Oh, many of his friends.

Q. Were most of his friends seamen?

A. Yes.

(Testimony of Victoria Ruth Foughty Heller.)

Q. And you necessarily became acquainted with them, is that correct? A. Yes.

Q. And was it customary for the seamen to have little drinking parties, and so on?

A. Yes, for four or five months we hadn't—I hadn't met very many of the people he sailed with. We were staying at home quite a bit and going to other people's homes, and with couples; and then after the house was bought and the arrangements were quite well made, this meeting was with just the fellows, and the drinking started.

Q. And was there a good deal of drinking, as a matter of fact, on these parties?

A. Well, after Mr. McSharry had a little difficulty in January, I would say there was quite extensive drinking while the Polk was in port.

Q. And did you then meet a man by the name of Berg? A. Yes.

Q. And so that the record will be clear, was there [399] ever any romantic connection between you and Mr. Berg? A. Absolutely not.

Q. Now, was he a friend of Mr. McSharry's?

A. Yes.

Q. Is that how you met him? A. Yes.

Q. Now, do you recall when you first met Mr. Berg?

A. Whenever the Polk was in port, which I think was very near the end of January 1955.

Q. Did you and Mr. McSharry see him from time to time?

A. Well, yes. The next trip, however, Mr. Mc-

(Testimony of Victoria Ruth Foughty Heller.)
Sharry and I had had a little difficulty through my not—previous to that time it had been our custom since the previous June to exchange letters every day while he was gone, and I had neglected to write, and there was a matter of personal feeling, and I didn't see a great deal of Mr. McSharry during that February trip.

Q. I see. Now, during the time that you met Mr. Berg, did you know what his occupation was?

A. Oh, yes.

Q. What was his occupation?

A. He was an oiler on an M.S.T.S. ship for the government.

Q. When you first met him and thereafter, did you [400] have any reason whatever to believe he was a procurer of any type? A. No.

Q. Or, to use a very vulgar term, did you know him to be a pimp? A. No.

Q. Did you ever hear him talk about his girl by the name of Rose West? A. Yes.

Q. Can you tell us when you first heard this name Rose West from him?

A. I think as Ted and I became friends that we, that because there was no romantic interest, I think that he confided in me very soon in the friendship.

It was my understanding, and I am sure that it was true that he had known Rose West for seven or eight years, anyway. It was only a period about four or five years, I understand, that they had kept

(Testimony of Victoria Ruth Foughty Heller.)
quite a deal of company and the romance had progressed.

Q. I see; now, at any time did he tell you that she had been a prostitute?

A. He told me that before—and I would say some time before—and through the carrying period with her baby that she had been a prostitute, that she had worked as a prostitute, that she had worked as a waitress. [401] That was all I really knew about the girl at the time.

Q. Did he say anything about wanting her to come up here to Seattle?

A. Yes, and it wasn't only Ted.

The Court: Just a minute. Answer the question.
By Mr. Kosher:

Q. Answer that. Did he ever tell you he wanted her to come to Seattle? A. Yes.

Q. How many times did he tell you that?

A. One thousand.

Q. Did he tell you what he wanted her to come up for?

A. He was in love with her, and wanted to marry her.

Q. Did he ever talk to you about getting a house or an apartment? A. Yes, yes.

Q. Now, where was Mr. Berg living in the early part of April, 1955?

A. Mr. Berg had taken a trip off of his ship because——

Mr. Guterson (Interposing): I will object. It is not responsive.

(Testimony of Victoria Ruth Foughty Heller.)

The Court: Listen to the question, and then [402] answer the question.

By Mr. Kosher:

Q. Some time in the early part of April do you know whether or not he took a trip?

A. He was living on the Polk.

Q. All right. Now, at that time did he make a trip to Los Banos, California? A. Yes.

Q. Did he tell you what he was going to Los Banos for?

A. His mother was undergoing some sort of surgery, and to see his girl.

Q. And did you see him after he returned from this trip to Los Banos? A. Yes, that day.

Q. You saw him the day he returned; do you remember what day that was, Mrs. Heller?

A. I would say about ten days, maybe twelve days, previous to the time Rose West arrived.

Q. Now, did he come out to your house to stay after that? A. I invited him out.

Q. And what was your reason for having him come out?

A. Because he was a seaman, a friend of Mc-Sharry's, waiting for his ship, and I felt it was a very nice friendly [403] gesture. Like all seamen, he didn't have a great deal of money, and I thought it was just a nice gesture.

Q. And while he was at your house, did you ever make any telephone calls to a woman by the name of Pat West or Rose West? A. No.

Q. Now, you heard Mr. Gunn on the witness

(Testimony of Victoria Ruth Foughty Heller.)

stand here, did you? A. Yes, I heard him.

Q. And you heard him testify that you had talked to Rose West down in California on the telephone. Will you state whether or not you ever told Mr. Gunn that you had talked to her on the telephone? A. No.

Q. Now, you heard the other gentleman from the F.B.I., who said you talked to him at one time. You heard him say that you told him that you had talked to Rose West on the telephone.

Will you tell the jury whether you ever made any such statement to that man?

A. I never even talked to that man at all. You mean Mr. Breen?

Q. Yes.

A. No, I told neither of them that I spoke to Rose West. [404]

The Court: What was the statement—you never talked to him at all?

The Witness: I thought he was referring to another man, your Honor.

By Mr. Kosher:

Q. I am referring to the agent who testified here that you told him that you had talked to Rose West on the telephone?

A. To neither of them did I ever make any statement that I had talked to Rose West on the telephone.

Q. Did you ever talk to Rose West on the telephone from your home to Los Banos, California?

A. Never. I talked to her from the airport.

(Testimony of Victoria Ruth Foughty Heller.)

Q. Now, did Mr. Berg tell you some time in the early part of April that Rose West was going to come up here? A. Yes.

Q. And did he tell you he was going to marry her?

A. Yes, she was coming up with the child.

Q. Now, referring to—you heard the testimony of Rose West, did you not? A. Yes.

Q. Did you ever tell her on the telephone that she could come up and live in your house and the words to this effect, "that she could practice prostitution, and [405] everything would be all right"?

A. No.

Q. Did you ever have any discussion with her with reference to practicing prostitution?

A. May I answer this in my own words?

Q. Yes.

A. On occasions when Rose was at my home and was drinking and referred to things she had done and people that she accused of having stayed with her, I had quite an argument with the girl.

Q. Now, do you recall the day that she arrived?

A. Yes; on a Wednesday morning.

Q. Let me go back. Did you ever send her any money? A. Absolutely not.

Q. Did you ever give anybody any money to send her? A. No.

Q. Did you know that anybody had sent her any money to come up here on?

A. Not at the time.

(Testimony of Victoria Ruth Foughty Heller.)

Q. Did you learn later that the money had been sent to her? A. Yes, later I did learn.

Q. Now, at any time you talked to Mr. Berg, did he ever tell you he wanted this girl to practice prostitution in Seattle? A. No. [406]

Q. Did he ever discuss with you the fact that he might want her to engage in prostitution any place? A. No.

Q. Did he ever discuss with you the fact that she might bring her little girl up here?

A. Yes.

Q. And did he talk about that frequently?

A. (Witness nodded in the affirmative.)

Q. Now, with reference to the morning of the 13th of April, 1955, did you see Rose West?

A. Yes. She called. Yes, I saw her when she arrived at my home.

Q. Did she make a telephone call to your house?

A. She had called me from the airport, and she had just gotten into town, and when she arrived at the house it was very close, very close to seven.

Q. In the morning? A. Yes.

Q. What, if anything, were you doing when she arrived?

A. I know what I was doing. For one thing, when she arrived at the house I know my older boy was in the shower. He left the house at seven-thirty for school—to catch the school bus. I was fixing breakfast, and in the [407] process of getting the children off to school.

Q. Now, did she arrive in a taxi? A. Yes.

(Testimony of Victoria Ruth Foughty Heller.)

Q. And did you get a chance to look at her when she came in the house?

A. Only a glance from the hallway. I felt that that was Ted's and her minute together.

Q. After you got the children off to school, did you have a chance to see and observe her?

A. Yes. And at that time——

Q. (Interposing): Well, did you have a chance to observe her? A. I did.

Q. And what was her condition?

A. She was intoxicated.

Q. Now, did she ask for anything to drink?

A. We were having breakfast, and I offered her breakfast. She told me that if I happened to have a drink in the house, she would prefer the drink.

Q. Did you give her a drink then?

A. Certainly, I did.

Q. Now, Mrs. Heller, how long did you stay in the house with Rose Berg on Wednesday? Bear in mind, that is the day she arrived.

Mr. Guterson: Just a minute. Her name is not Rose Berg. [408]

Mr. Kosher: Excuse me. Rose West.

A. I was in the house I would say approximately until and very close to eleven-thirty that morning.

By Mr. Kosher:

Q. And then what did you do?

A. Mr. Berg, who had offered to help me select a car, and I, went down town in a cab, and

(Testimony of Victoria Ruth Foughty Heller.)

looked at Pontiacs and Dodges for almost a complete day.

Q. Now, on that day did you stop in to the Firelight Room? A. Yes.

Q. And at about what time did you stop in the Firelight Room?

A. After the — I am not just exactly sure. Through the course of looking for the cars and trying to decide and going through the pamphlets on the cars we did stop there and were there for some time.

Q. Now, on Wednesday at any time did you discuss with Rose West the fact that she could practice prostitution in your house?

A. Absolutely not.

Q. And did you tell her that if she practiced prostitution in your house that you would take three dollars out of every ten dollars that was earned? A. No. [409]

Q. And that if she practiced prostitution down town or some place else, you would take four dollars out of her ten dollars? A. No.

Q. And did you ever talk to a man on the telephone that afternoon and invite him to come out and have intercourse with Rose West?

A. I don't recall talking to anyone. I wasn't even home.

Q. Well, answer my question. A. No.

Q. You did not. Now, about what time did you get home? About what time did you get home Wednesday evening?

(Testimony of Victoria Ruth Foughty Heller.)

A. It was within a few minutes of nine o'clock.

Q. Had you made a call home prior to that time?

A. I had made several calls home.

Q. Did you talk to Rose West on the telephone?

A. Yes. I primarily talked to my son.

Q. Before you went down town—can I ask you this—did you have some dinner in the oven?

A. Yes, I had put one-half a ham in there.

Q. After you got home at nine o'clock, what happened?

A. Should I just tell in my own words?

Q. Yes; go ahead and tell in your own words.

A. The cab driver who brought us back to the house knew that we had been down town the entire day looking and trying to select a car.

This particular cab driver told me about a gentleman friend of his who does get fairly good prices, I believe the wholesale price, on Chevrolets, that they purchase for the cab company, and told me that he would be very happy to have the man talk to me. Shortly after getting home he called me and told me if it wasn't too late, that he would like to bring the fellow out so that we could discuss the car. The man was not going to be available the next day.

Q. Did the man come out that evening?

A. Yes.

Q. About what time did he come?

A. Very shortly afterwards; around eleven, I would say.

Q. Did you talk to him about purchasing a car?

(Testimony of Victoria Ruth Foughty Heller.)

A. Yes.

Q. And then what happened?

A. Well, I didn't like it any better than the Dodge or Pontiacs, and dismissed it from my mind.

Q. What was Rose West doing all this time?

A. Acting terribly.

Q. Had she been drinking while you had been gone? [411]

A. All day long. At the time——

Q. (Interposing): And——

(Whereupon, there was a brief pause.)

Q. (Continuing): ——did you try to get her to go to bed? A. She left the house.

Q. Did she leave the house? About what time did she leave the house?

A. Probably very close to twelve o'clock.

Q. Where did she go, do you know?

A. No, I still don't know.

Q. And what time did she return to the house?

A. After——

Q. (Continuing): If she returned at all?

A. After one o'clock. Two o'clock, I would say.

Q. And who was with her when she came?

A. She had two gentlemen, two Mr. Bakers, who were not related.

Q. Do you know who this Mr. Baker was?

A. Yes, he was a contractor from Alaska. The younger Mr. Baker is a friend of the older Mr. Baker's son.

Q. What was Rose's condition when she came home?

(Testimony of Victoria Ruth Foughty Heller.)

A. Worse than when she left. Drunk.

Q. Will you state whether or not she attempted to go back down town again? [412]

A. She went—when the men left—he and I—in fact, both Mr. Bakers and I sat in the living room, in the dining room, excuse me, and talked, and he told me about his business and we discussed the pictures of my children that were there, and he was very impressed with——

Q. (Interposing): Anyway, you had this discussion with him. Did she make any attempt to go back downtown?

A. Yes. He wouldn't allow it. He told her he had brought her home because of the condition she was in, that he could have her cab, and he would call another cab, but that he would not go down town with her.

Q. At any time that morning, either before or after she went down town, did she commit any acts of prostitution in your house?

A. When I arrived home——

Mr. Guterson (Interposing): Objection.

By Mr. Kosher:

Q. Answer yes or no. A. No.

Q. Now, you heard her testify, did you not, that between two and three o'clock in the morning or two and four in the morning, or something like that, she committed some acts of prostitution. Is that true or false? A. It is false.

Q. She also testified that you and Mr. Berg were

(Testimony of Victoria Ruth Foughty Heller.)

[413] both present when these acts of prostitution were committed? Is that true or false?

A. It is false.

Q. Now, what did she do after these two gentlemen left the house? A. She went to bed.

Q. That would be Thursday morning—isn't that right? A. Yes.

Q. And do you recall what time you got up? What did you do then? A. I went to bed.

Q. Do you recall what time you got up Thursday morning?

A. Approximately six-thirty or a quarter to seven.

Q. You didn't get very much sleep, then?

A. No.

Q. What did you do the next day?

A. The first thing in the morning I talked to my sister-in-law, Mrs. Foughty, on the telephone, and she suggested to me I contact the Oldsmobile dealer. She had Mr. McCulloch call me. It was a friend she had known. He called me and made an appointment to pick me up right around noon and take me and show me the Oldsmobile.

Q. Did you leave your home, then, about twelve o'clock Thursday? [414] A. Yes.

Q. Tell the jury in your own words now what you did then in the afternoon, and just make it very brief, please. Just generally what you did?

A. He demonstrated the 88 Oldsmobile he had brought to me. I decided on an Oldsmobile. We went to my bank and withdrew the money for the

(Testimony of Victoria Ruth Foughty Heller.)

down payment on the car. We went back over to Kirkland where his dealership is, made all the necessary papers, had my credit approved, and in the meantime, after we were back in Kirkland, I had decided on the 98 Oldsmobile, and, therefore, he gave me this 88 demonstrator to use until he could get a delivery on the new 98.

I came back home about six or seven o'clock. Rose and Ted had very kindly fixed dinner, and everything was done when I got there. Due to the lack of sleep of the night before, I showered and went to bed immediately.

My children and Rose and Ted were watching television.

Q. Was she in fairly good shape at that time?

A. The best I had seen her in.

Q. Were she and Ted getting along pretty well at that time as far as you could see?

A. Yes. [415]

Q. Did they discuss getting married at that time? A. It was constantly discussed.

Q. Now, what time did you get up Friday?

A. Friday? Well, of course, I got up and got the children off to school. Friday morning the General Polk was coming back into port, and Ted had asked me if he could use the 88 to go down and meet the ship, as it came in with all of his friends on it. It came in at eight o'clock.

Q. Did you let him do that—you let him use it?

A. Oh, yes.

Q. Did you go down town at all that day?

(Testimony of Victoria Ruth Foughty Heller.)

A. Later in the afternoon.

Q. And what time did you go down town, Mrs. Heller?

A. Middle of the afternoon.

Q. In the middle of the afternoon?

A. Yes, middle of the afternoon.

Q. And who went downtown with you?

A. Rose.

Q. Rose and you both went down town, and where did you folks go?

A. We went to the Northern Lights.

Q. What is the Northern Lights?

A. It is a restaurant and cocktail lounge.

Q. Did you and she and Mr. Berg have something to [416] drink down there?

A. Yes. George Pearce had stopped out earlier in the afternoon and was there, and several different of his shipmates stopped in there.

Q. Now, did you all drink much down there at the Firelight Room?

A. We all drank too much.

Mr. Guterson: Is this the Firelight Room?

The Witness: No.

By Mr. Kosher:

Q. Northern Light? A. Northern Light.

Q. And then what did you do?

A. I had to be back at the house at 9:30 for delivery of the new 98 Oldsmobile.

Q. Did you go back home then?

A. Yes. Rose, Ted, George Pearce and myself all went back out to the house.

(Testimony of Victoria Ruth Foughty Heller.)

Q. What was Rose's condition at that time insofar as sobriety was concerned?

A. Intoxicated.

Q. Now, would you tell us what happened Friday evening?

A. In the meantime, George Pearce, who was very much inebriated, tried to persuade Rose to come with us. [417]

Q. And she wouldn't come?

A. Yes, just absolutely wouldn't come.

Q. Then did you bring the guests back to the house for the party?

A. Yes. It took us about two hours to get everybody together.

Q. Will you tell the jury why it was you had this party, so late in the evening?

A. Well, because of the particular people that we knew. Each time they are in port they are *not* different watches, and because of this time in docking—well, Bob McSharry didn't get off watch until twelve midnight.

Q. Can you tell us about what time this party started?

A. About two.

Q. About two in the morning?

A. Yes.

Q. And was it a drinking party?

A. Yes.

Q. And did some of the boys roll some dice there?

A. I believe they did. Yes, I am sure they did.

Q. What was Rose doing all this time?

A. Well, from the time we had gone down town around eleven-thirty, she had evidently been drink-

(Testimony of Victoria Ruth Foughty Heller.)

ing. When we came back to the house, George Pearce was up. [418]

They were drinking together, and Pat Gentile and Danny Bard, who were coming to the party, were there waiting for us. She was just drinking and she was just drunk when I returned home.

Q. What happened then that evening? Can you tell us very briefly what happened?

A. Well, everyone was having a very good time. George Pearce went back and lay down on the top of the bed in the guest room. Mr. Busby was a mate on the ship and hadn't had any sleep for some time, and went back and laid down in the same bed with him.

At a time after that, I would say one hour or so, Rose left that particular bedroom. She walked into the bathroom, walked out and went into the bathroom, directly across the hall. I walked in and she had this wallet in her hand. She had it opened and I looked at it. I asked whose it was and she said it was one of those fellows. I know at the time there were seven fifty dollar bills in the wallet.

Q. How did you know that, Mrs. Heller?

A. Because I counted it. I wanted to be able to check with him and know that the money was intact. I felt, however, it was, inasmuch as I had walked in so immediately.

Q. You counted the money then. Did you take the—— [419]

A. Yes, I put the money back in and watched

(Testimony of Victoria Ruth Foughty Heller.)
her return it to the bedroom and lay it on the dresser.

Q. And then what happened?

A. Then a little time later, and not very much in time—and by this time, in fairness to Rose, she was very intoxicated. She went back into the bedroom, and when I saw her come out, I looked—I went in and looked in the wallet again, and there were only three fifty-dollar bills left. So I asked her to return them. She did return three of them. At this time—and the first word that I had said, it wasn't fair to Rose, I did call Ted. I felt it was time to talk to him about his shipmate.

Ted took out of his own pocket the \$50.00. He took \$50.00 in odd change and bought a fifty-dollar bill and returned it to Mr. Busby's wallet, and put it back in the bedroom.

Approximately one hour later Ted and I thought maybe we should check again, and there were three more gone.

Q. Three more fifty-dollar bills?

A. Three more fifty-dollar bills gone.

Q. Did you say anything to her about the three fifty-dollar bills?

A. Yes, we did.

Q. What, if anything, did she say about it?

A. She denied having them. She denied over a [420] great period of time that she had them. That she had them previously she admitted, but that she wouldn't do anything like that.

Teddy had made up the difference in the money, and that she wouldn't do anything like that. It

(Testimony of Victoria Ruth Foughty Heller.)

finally narrowed down to Rose calling me in the living room and I would say this, it went on for one or two and one half hours, and she told me we thought we were so clever, if she wanted to hide this money we never would find it, and then she spit three little balls out of her mouth, which were three fifty-dollar bills.

Q. What happened after that?

A. Ted immediately became busy washing these three fifty-dollar bills, namely, trying to get them replaced in Mr. Busby's wallet before he knew anything like this happened. Mr. Busby got up before we finished.

Q. Were there words between Mr. Berg and Rose at that time?

A. Yes. Mr. Berg felt and expressed himself quite plainly, that it was like stealing his own money. After all, he had replaced it the first time she kept the fifty dollars.

Q. Did you get into it?

A. I ordered her from my home. I did ask her to return the money before she left, and ordered her from my [421] home.

Q. Did she leave then?

A. No. She was trying to convince me she still didn't have this fifty dollars.

Q. Was there a fifty-dollar bill still missing?

A. Yes, from the first time Mr. Berg had made it up.

Q. And then what happened?

A. She was drinking a cup of coffee at the

(Testimony of Victoria Ruth Foughty Heller.)
dining room table. Mr. Berg had gotten up at that time. Mr. McSharry, who was in my bedroom and who had gone to sleep, got up. They came out in the kitchen. We were all sitting in the kitchen with the exception of Rose. She just got up and left. She went out the patio door.

Q. Did you know where she had gone?

A. We didn't know where she had gone. We know—I felt that I had been rude, and that I could have done things a little nicer; but Mr. Berg thought she might have gone to a neighbor, and he did go to a neighbor's house and ask if she were there.

Q. Now, at any time did you and Mr. Berg abuse her while she was in your house in any way?

A. I wasn't very kind that last evening.

Q. You mean——

A. (Interposing): After the money.

Q. Now, did you ever accept any money from this woman for any purpose whatsoever? [422]

A. No.

Q. Did she ever give you as much as one penny in all the time you have known her? A. No.

Q. For any purpose? A. No.

Q. Did she ever commit any acts of prostitution that you know of while she was in Seattle?

A. No.

(Whereupon, there was a brief pause.)

Q. Now, Mrs. Heller, I will ask you specifically if at any time, on or about the 13th day of April, 1955, were you ever—whether or not you ever

(Testimony of Victoria Ruth Foughty Heller.)

persuaded or induced or enticed Rose Drucilla West to go from San Francisco, California, to the Western District of Washington? A. No.

Q. Did you ever harbor any intent at any time that she should engage in prostitution any place?

A. No.

Q. Did you ever harbor the intent that she should practice prostitution in Seattle?

A. No.

Q. Did you ever cause her to go or be carried on a common carrier from San Francisco, California, to Seattle? [423] A. No.

Q. Did you ever do anything at all to help her get from San Francisco to Seattle?

A. Nothing.

Q. Where are you living at the present time?

A. I am still in my home.

Q. And where are the children now?

A. After I was arrested a week later the children were taken by the county authorities. I now have them placed, with the Court's permission, in friends of mine's home.

Q. And you pay their board there?

A. Oh, yes.

Q. Have you ever gotten any help from anybody towards supporting these children?

A. I get help very frequently from my family.

Q. And did Mr. McSharry help you from time to time? A. Yes, he did.

Q. During the time you were planning on getting married, did he give you money every month?

(Testimony of Victoria Ruth Foughty Heller.)

A. Yes.

Q. And do you and Mr. McSharry still plan on getting married if you can? You can answer that question.

A. I can only answer for myself—yes.

Q. I take it that all during this time you actually loved Mr. McSharry? [424]

Mr. Kosher: Do you wish to inquire, counsel? I am through.

Mr. Rousso: No, I haven't any questions of this witness.

Cross Examination

By Mr. Guterson:

Q. You stated at one time your occupation was that of a dental assistant? A. Yes.

Q. When was that?

A. In 1942 and 1943 and a part of 1944.

Q. And since 1944 have you been employed?

A. I was married until 1948. Since that time I have not been employed on a steady occupation.

Q. Have you been employed on a non-steady occupation?

A. Yes, I have done some selling. Through my marital break-up I have some rental properties, and, as I have said, my family have been very good to the children.

Q. What have you sold?

A. I sold oil stock and several years ago Avon Products.

Q. You were present in the court room this morning when Mr. McSharry was on the witness stand? A. Yes. [425]

(Testimony of Victoria Ruth Foughty Heller.)

Q. Did you know he testified that during the month of December of the year 1954 on occasions when he was at your present residence on Mercer Island he had various conversations with you in regard to prostitution? Do you recall that testimony by him? A. Yes, I recall it.

Q. Is it your testimony that what he said—did you, in fact, have a conversation with him of that nature in December, 1954? A. No.

Q. You never did? A. No.

Q. That is the man you still intend to marry?

A. It is very hard to answer yes or no.

Q. I understand; you were present this morning when Mr. McSharry was on the witness stand and testified in the month of January, 1955, when he was at your residence on one specific occasion when you were both in the bedroom, when you spoke on the telephone and said to the person on the other end that there were two girls in town and that you felt he should tell his boys about them and give them a try. Did that take place or not?

A. Not in that light, and I don't remember it.

Q. You don't remember? A. No. [426-7]

Q. It may have taken place?

A. Certainly not in the light it was reflected in.

Q. What light did it take place in, then? You tell me.

A. I believe quite certainly that it didn't happen.

Q. Was Mr. McSharry in your home in January, 1955?

A. For a matter of two hours.

(Testimony of Victoria Ruth Foughty Heller.)

Q. You met Mr. Berg, you say, through your association with Mr. McSharry? A. Yes.

Q. But there was never any romantic inclination between the two of you — you were just good friends? A. Just friends.

Q. And during the month of March Mr. Berg went to Los Banos? A. Yes.

Q. Were you aware of that? A. Yes.

Q. Did you know he was going beforehand?

A. Oh, yes.

Q. Had he ever been at your home before he made that trip? A. Yes.

Q. And when he returned, did he call you?

A. Well, he called me, and I was down town.

Q. You contacted him after his return?

A. Yes.

Q. Now, with regard to the trip that Mr. Berg made to Los Banos in March, 1955, you were present this afternoon when Mr. Breen testified to the effect that when Berg returned—this was your conversation to Mr. Breen, according to Mr. Breen—that when Berg returned, he told you that arrangements had been made and he had spoken with Rose West, and that she was coming to Seattle.

Did that conversation take place with Mr. Breen?

A. I had a conversation with Mr. Breen.

Q. Did you discuss what I have just enunciated?

A. No, no.

Q. You say you contacted Mr. Berg down town after he returned to Seattle from this trip?

A. Yes.

(Testimony of Victoria Ruth Foughty Heller.)

Q. And at that time the U. S. General Polk was at sea? A. Yes.

Q. And he was without employment?

A. Yes.

Q. And as a friendly gesture you invited him to reside with you? A. Yes.

Q. What is your telephone number at your home *on*]429]

A. Adams 1569.

Q. And what was your telephone number in April of 1955, do you remember?

A. I am sorry; I don't remember the number.

Q. Adams 5680?

A. Adams—I guess I have forgotten, actually.

Q. At any rate, in May that phone was disconnected, and now you have a different phone?

A. Yes.

Q. Was Mr. Berg living at your home in the early part of April, 1955?

A. Whenever he—the only way I can relate dates is from when the Polk was in port.

Q. All right.

A. When he returned from his trip seeing his mother and Rose in Los Banos, he did stay at my house. It was a temporary arrangement first.

Q. And he remained on until the Polk came back in, April 15th? A. Yes, he did.

Q. So that on the 3rd, 10th and 12th of April, 1955, he would have been residing in your home, is that correct, Mrs. Heller?

(Testimony of Victoria Ruth Foughty Heller.)

A. I am not sure about the 3rd. The other two dates, yes. [430]

Q. I will hand you what are exhibits in evidence as Plaintiff's Exhibits 5, 6 and 7, which are toll tickets of long-distance telephone calls originating at Adams 5680.

Were any phone calls made from your phone at Adams 5680 to the number Los Banos 2404 in April, 1955?

Mr. Kosher: I object to that upon the grounds of improper cross examination.

The Court: I think she denied making any telephone calls. This relates to the same matter.

Mr. Kosher: I mean with reference to the exhibits he handed her.

Mr. Guterson: I am just helping to try to refresh her memory.

The Court: Mr. Reporter, read the question.

(Whereupon, the preceding question was read by the reporter.)

A. I would have to have a calendar to verify the first one of the three.

Q. What about the other two—the 10th and the 12th?

A. Mr. Berg had asked me if he could make phone calls on my phone.

Q. Answer the question.

Mr. Kosher: Answer if you know; if you don't, just say so. [431]

A. I don't actually know that they were made.

(Testimony of Victoria Ruth Foughty Heller.)

By Mr. Guterson:

Q. Did you testify, Mrs. Heller, that you don't know at all of any telephone calls that were made from your home to Los Banos? A. Yes.

Q. That is your testimony? A. Yes.

Q. Go ahead.

A. Other than Ted telling me he was charging phone calls to my phone, and would pay me when I received the bill.

Q. He did tell you he was; did he tell you he was making them from your number?

A. Well, yes. At no particular time.

Q. Were you ever present when he called Los Banos?

A. I don't believe that I have been present.

Q. Did you ever talk to Miss West?

A. No.

Q. On a long-distance call from Seattle?

A. No.

Q. You were present this afternoon, were you not, Mrs. Heller, when Mr. Breen of the F.B.I. testified as a witness? A. Yes.

Q. Do you recall the testimony of Mr. Breen to the [432] effect that when he spoke to you August 25, 1955, you told him you spoke over the telephone to Rose West in early April, and that you told Rose to come to Seattle.

Did you or did you not make that statement to Mr. Breen?

A. I did not make the statement as it stands, no.

Q. Do you want to explain it in any way?

(Testimony of Victoria Ruth Foughty Heller.)

Mr. Kosher: I object, if your Honor please. I think she answered the question. She said she didn't make the statement.

Mr. Guterson: All right.

By Mr. Guterson:

Q. You were present this morning, were you not, Mrs. Heller, when Mr. Gunn of the F.B.I. was on the witness stand? A. Yes.

Q. Do you recall the testimony of Mr. Gunn to the effect that when he spoke to you April 28, 1955, that you told him on that occasion that you did, in fact, speak with Miss West long distance from Seattle to Los Banos from your home in April, 1955.

Do you recall his testimony?

A. I recall his testimony.

Q. Now, did you or did you not speak long-distance with Miss West? [433]

A. I did not.

Q. Did you or did you not make that statement to Mr. Gunn?

A. I did not. Mr. Gunn's notes are rather hard to refresh anyone's memory on.

Q. Just answer the question.

A. No, I did not.

Q. Now, you say that the first time—now, you say that the first time that you spoke to Miss West was on her call to you from the airport when she arrived in Seattle?

A. That was the first time.

Q. That was early Wednesday morning, April 13, 1955? A. Yes.

(Testimony of Victoria Ruth Foughty Heller.)

Q. You had never heard her voice before?

A. Never.

Q. Did you know she was expected that morning?
A. Not particularly that morning.

Q. Did you answer the phone when it rang?

A. Yes.

Q. Do you know how she knew what your telephone number was?
A. Not at the time.

Q. And when you answered the phone, what was your conversation? [434]

A. I think I told her, "Welcome to Seattle," and apologized for the fact I had no transportation, and asked her if she would like to come out for breakfast, in a cab.

Q. Just a friendly chat?
A. Yes.

Q. And you invited her to your home?

A. Yes.

Q. Did she come to your home?

A. Yes, she did.

Q. How soon after the conversation?

A. Oh, one hour.

Q. Did she arrive by taxicab?
A. Yes.

Q. Mr. Berg was at your home at that time?

A. Yes.

Q. He had been staying there for a week, or some time?
A. Yes.

Q. He had been living there both day and night, is that correct?
A. Except for working.

Q. This was a time when the ship was away?

A. He had special assignments on this exception.

Q. You stated when Rose arrived at your house

(Testimony of Victoria Ruth Foughty Heller.)
that she was intoxicated and had been drinking heavily? [435] A. Yes.

Q. And you criticized her because she was in that condition? Was that your testimony?

A. Yes.

Q. And you wished to look after her; you were interested in her welfare?

A. Interested in Ted's welfare.

Q. Yes; and you were just getting the children's breakfast, is that right?

A. Yes, just getting breakfast ready.

Q. Now, you were present this morning, were you not, when Mr. Gunn of the F.B.I. testified, Mrs. Heller? A. Yes.

Q. Do you recall his testimony to the effect that when you conversed with him on April 28, 1955, you told him that when Rose arrived she said something to you about having intercourse with a pilot, and about having received \$15.00, and that you reprimanded her and told her that was too cheap; and do you recall that testimony of Mr. Gunn?

A. I remember her statement, but not my words.

Q. Do you recall the testimony of Mr. Gunn?

A. Yes.

Q. Now, did you or did you not make that statement? A. I did not.

Q. Did you or did not you have that conversation [436] with Miss West?

A. Miss West did tell me that, and I told her I wanted no conversation whatsoever like that in my home where my children resided.

(Testimony of Victoria Ruth Foughty Heller.)

Q. But you say you never related this conversation to Mr. Gunn?

A. I may have told Mr. Gunn, yes, that that is what she said; but not my answer, no.

Q. You welcomed—

Mr. Kosher: May she have a drink of water, please?

The Court: Do you desire a drink of water?

The Witness: Please.

The Court: All right.

(Whereupon, there was a brief pause, during which time the bailiff handed the witness a glass of water.)

The Court: You can continue.

Mr. Guterson: Thank you.

By Mr. Guterson:

Q. At any rate, you welcomed her into your home, and told her she could come in and stay; is that correct?

A. At that time? I don't understand your question.

Q. Early in the morning, Mrs. Heller, of Wednesday, April 13, 1955, Miss West had just arrived at your home, and you welcomed her into your house, and told her that she [437] could stay?

A. I did not tell her she could stay at that time.

Q. What did you tell her with regard to where she might stay?

A. A little later, after the children were at school.

Q. Yes?

(Testimony of Victoria Ruth Foughty Heller.)

A. I asked Miss West if she would be more comfortable at my home for a few days until they made other living arrangements, that she was very welcome, as a friend of Ted's, in my home.

Q. Ted was staying there also at that time?

A. Yes.

Q. It is your testimony, Mrs. Heller, that you stayed at home that morning until about eleven-thirty a.m., is that correct?

A. Yes.

Q. Did you stay awake, or did you sleep?

A. I was awake.

Q. You were present this morning when Mr. Gunn of the F.B.I. testified?

A. Yes.

Q. Do you recall Mr. Gunn's testimony that when you and he conversed, April 28, 1955, you told him on the morning of Wednesday, April 13th, you were asleep until [438] one o'clock in the afternoon, and whatever Rose did was her own business?

A. I do not remember testifying to that.

Q. Did you or did you not make that statement?

A. I did not.

Q. Is it true, or not true?

A. It is not true.

Q. You were awake; was Rose awake or did Rose sleep?

A. Rose was going to shower and go to bed after I left. She was awake. She was awake, drinking.

Q. Now, you said you left the home then at about eleven-thirty in the morning to look for a new automobile?

A. Yes.

Q. You left with Mr. Berg?

A. Yes.

(Testimony of Victoria Ruth Foughty Heller.)

Q. And in the home was Rose? A. Yes.

Q. And no one else? A. And no one else.

Q. And the boys were in school?

A. The boys were in school.

Q. And during the course of your travels looking for a car, you stopped at the Firelight Room in the Moore Hotel? [439] A. Yes.

Q. And the gentleman who testified on your behalf earlier is the man who remembers that?

A. Yes.

Q. And you got home about nine o'clock in the evening, is that right? A. Yes.

Q. Had you been home at all between eleven-thirty in the morning and nine o'clock in the evening? A. I had not been home.

Q. Had Mr. Berg been with you all of that time?

A. Yes.

Q. Were your boys at home when you came home? A. Yes.

Q. Were they asleep?

A. As soon as I got home, they went to bed.

Q. Rose had been taking care of them during the day? A. Yes.

(Whereupon, there was a brief pause.)

Q. Now, with regard to Rose coming to Seattle, is it your testimony that you were not aware of any money being sent—any \$60.00 being sent—from Seattle for that purpose?

A. Not before she arrived. [440]

Q. Did you speak about that matter with Mr. Breen when you talked to him on August 25, 1955?

(Testimony of Victoria Ruth Foughty Heller.)

A. I don't remember.

Q. You were present when Mr. Breen testified this afternoon, were you not, Mrs. Heller?

A. Yes, I was present.

Q. You recall he testified when he conversed with you August 25th that you told him that the \$60.00 had been borrowed by Mr. Berg from a friend of yours, Mr. Gentile, and Mr. Berg paid him back the next day; and you took him down to the Western Union office?

A. In the interval I heard it.

Q. Did you have that conversation with Mr. Breen? A. Yes.

Q. That conversation you did have?

A. Yes.

Q. Mr. Breen was telling the truth on that occasion? A. Yes.

Q. Now, this first night, Wednesday night, at nine o'clock when you got home and the boys went to bed, is that the night Rose left and you said you don't know where she did go?

A. Yes. Monday—I mean Wednesday.

Q. Wednesday? A. Wednesday. [441]

Q. And you and Mr. Berg remained at home?

A. Yes.

Q. And you say about two o'clock in the morning she came back with two gentlemen named Baker? A. Yes.

Q. You say you did know these two Mr. Bakers?

A. No.

Q. You did not know them? A. No.

(Testimony of Victoria Ruth Foughty Heller.)

Q. They were strangers to you? A. Yes.

Q. That is the first time you had ever seen them?

A. Yes.

Q. When Rose returned with the two Mr. Bakers, was there anyone else in the house besides Rose, the two Mr. Bakers, Mr. Berg and yourself?

A. There was Bob Marshall, Cab Driver 39, whom I used quite frequently before buying the car, and this gentleman friend of his that he brought with him. There was Pat Gentile and Daniel Bard.

Q. It was about two o'clock in the morning?

A. Very close in there.

Q. You were present this morning when Mr. Gunn of the F.B.I. testified, were you not, Mrs. Heller? A. Yes. [442]

Q. Do you recall he testified that you and he conversed on April 28, 1955, and he said that during the course of that conversation you told him that this same Baker is a man who lives at the Stewart Hotel, and carries \$5,000 on his person at all times, and that also there was a Walter or Elmer Baker, a friend of Elmer's son, who was being set up for a dice game.

Do you recall the testimony?

A. I recall the testimony.

Q. Did you or did you not make the statement to Mr. Gunn?

A. That I had heard from Mr. Baker in my home that evening.

Q. Did you tell that to him when you talked to him on April 28th?

(Testimony of Victoria Ruth Foughty Heller.)

A. I believe I told him Mr. Baker told me about the money he carried.

Q. Was there any dice game that night?

A. Not with either Mr. Bakers.

Q. Some of the others? A. Yes.

The Court: Mr. Volinn, do you wish to be excused?

Mr. Volinn: Yes, I would like to be.

The Court: I understand you have another [443] appointment. Is there any objection?

Mr. Volinn: May I inquire how much longer the cross examination will be?

The Court: Do you have any objection to interrupting cross examination at this time? Are you about through, or do you have any objection to interrupting?

Mr. Guterson: I would just as soon interrupt. I think I have quite a bit more to complete.

The Court: So that you don't anticipate finishing in a few minutes?

Mr. Guterson: Not within a few minutes.

The Court: All right. We will recess then. [444]

* * * * *

VICTORIA RUTH FOUGHTY HELLER
upon being recalled as a witness for and on behalf
of the defendants, and having been previously duly
sworn, testified as follows:

Cross Examination—(Continued)

By Mr. Guterson:

Q. Mrs. Heller, was it your testimony that

(Testimony of Victoria Ruth Foughty Heller.)

Thursday night, April 14th, was the night you came home after car hunting and went to bed at an early hour? A. Yes.

Q. And you say you arose on Friday and both you and the defendant Mr. Berg and Rose West all went to town—is that correct?

A. In the afternoon, late afternoon.

Q. You didn't go until late afternoon; were you all three at your home during the morning and early afternoon hours? A. No.

Q. Where were you during the day of Friday?

A. I was home.

Q. Was Miss West at home? A. Yes.

Q. Was Mr. Berg at home? A. No. [451]

Q. That was the day you permitted him to use a car to go down and get his friends at his ship; the ship docked at eight o'clock? A. Yes.

Q. And then later on in the afternoon you and Mr. Berg and Miss West all went down town—was that your testimony? A. Yes.

Q. Is that what you three did?

A. Eventually, yes.

Q. About what time did you leave?

A. Rose and I went down, it would have been, I would consider early evening.

Q. And Mr. Berg?

A. Mr. Berg and Mr. Pearce were already down town.

Q. And you met and went to a place called the Northern Lights, is that correct? A. Yes.

(Testimony of Victoria Ruth Foughty Heller.)

Q. Is it your testimony you had a little bit too much to drink; is that your testimony?

A. No.

Q. Were you drinking down there?

A. Yes.

Q. And who was at the home with your children during this time? [452]

A. My sister-in-law.

Q. And what time did you come back home?

A. At nine-thirty.

Q. And at eleven-thirty you went back to town, is that right, with Mr. Berg? A. Yes.

Q. And you left and Miss West and Mr. Pearce — you left Miss West and Mr. Pearce at your residence? A. Rose insisted on staying home.

Q. And she and Mr. Pearce both stayed at your home? A. Yes.

Q. And before you had left down town at nine-thirty to come home, did Mr. Pearce give you some money? A. Yes.

Q. How much money did he give you?

A. He — actually, he offered me whatever I wanted, and he handed me this \$150 or \$200, I believe it was a figure in between, telling me that this was on a Friday night, and there was a difference in the down payment of the two cars which I was to take care of that evening.

Q. How much money did he give you?

A. Between \$150 and \$200; right in there.

Q. That was down at the Northern Lights, was it, before he came to the home? [453]

(Testimony of Victoria Ruth Foughty Heller.)

A. Yes.

Q. And after you and Mr. Berg left at eleven-thirty and went back downtown, did you subsequently meet Mr. McSharry? A. Yes.

Q. And you went to the Northern Lights and to the Sportsman and to the Stork Club?

A. No.

Q. Where did you go?

A. Because of our trying to coax Rose to go down town with us, and not to stay at home, we were too late to pick Mr. McSharry up at the dock, and we met him at the Sportsman's Club, I would say, about twelve-twenty.

Q. And then where did you go?

A. To the Stork Club.

Q. To the Stork Club? A. Yes.

Q. You were present yesterday when Mr. McSharry was a witness in this case? A. Yes.

Q. Do you recall Mr. McSharry's testimony while you and he and the others were at the Stork Club, that he asked you if you would get a date for Mr. Busby; do you recall that testimony by Mr. McSharry? A. Yes. [454]

Q. Did you and he in fact have that conversation?

A. I couldn't remember whether we had it at that occasion or not.

Q. You might have?

A. He has asked me a great many times to get girl friends.

Q. Just answer the question.

(Testimony of Victoria Ruth Foughty Heller.)

A. I may or I may not have.

Q. I see; and then Mr. McSharry testified, as you will recall, yesterday, that after you returned from the telephone you told him it had all been taken care of; did that conversation take place between you and Mr. McSharry? A. No.

Q. That never took place? A. No.

Q. You recall yesterday when Mr. Breen of the F.B.I. was a witness, do you not, Mrs. Heller?

A. Yes.

Q. Do you recall that Mr. Breen testified that when you and he conversed in the F.B.I. office on the 25th of August, 1955, you told him you had called a girl by the name of Bonnie from the Stork Club; do you recall that testimony of Mr. Breen?

A. I never stated I called from the Stork Club.

Q. Do you recall that testimony? [455]

A. Yes.

Q. Did you or did you not call a girl named Bonnie from the Stork Club?

A. I don't know where I called her from.

Q. Did you call her in the early morning hours of Saturday, April 16, 1955? A. Yes, I did.

Q. Do you further recall when Mr. Breen of the F.B.I. was a witness yesterday afternoon he testified that when you and he conversed, August 25, 1955, you told him when you talked to this girl named Bonnie in the early morning hours of April 16, 1955, that you told her to come out to your home, that you had a \$25.00 date for her; do you recall that testimony of Mr. Breen's?

(Testimony of Victoria Ruth Foughty Heller.)

A. I recall his testimony, yes.

Q. Did you or did you not make those statements to him in his office?

A. Not in that manner, no.

Q. Did you or did you not call Bonnie and have that conversation with her? A. I did not.

Q. What did you tell Mr. Breen in his office?

A. What happened.

Q. Did you or did you not tell Mr. Breen that you called a girl named Bonnie and told her you had a \$25.00 [456] date for her at your home?

A. Not in that manner, I did not.

Q. In what manner did you tell her?

A. I asked her and invited her out to a party.

Q. Is that what you told Mr. Breen?

A. Yes.

Q. And then what Mr. Breen testified you told him, that you called her and told her you had a \$25.00 date—Mr. Breen was not telling the truth?

A. I wouldn't for a minute attempt to say Mr. Breen was not telling the truth.

Q. Then explain it to me.

A. I am saying over a five hour conversation which I had with Mr. Breen certain little points could very easily be confused.

Q. Is this one of them?

A. Yes, this is one of them.

Q. You are confused, not Mr. Breen?

Mr. Kosher: Now, just a minute.

The Court: Just a minute. Did you make a statement, or did you ask a question?

(Testimony of Victoria Ruth Foughty Heller.)

A. I may or I may not have.

Q. I see; and then Mr. McSharry testified, as you will recall, yesterday, that after you returned from the telephone you told him it had all been taken care of; did that conversation take place between you and Mr. McSharry? A. No.

Q. That never took place? A. No.

Q. You recall yesterday when Mr. Breen of the F.B.I. was a witness, do you not, Mrs. Heller?

A. Yes.

Q. Do you recall that Mr. Breen testified that when you and he conversed in the F.B.I. office on the 25th of August, 1955, you told him you had called a girl by the name of Bonnie from the Stork Club; do you recall that testimony of Mr. Breen?

A. I never stated I called from the Stork Club.

Q. Do you recall that testimony? [455]

A. Yes.

Q. Did you or did you not call a girl named Bonnie from the Stork Club?

A. I don't know where I called her from.

Q. Did you call her in the early morning hours of Saturday, April 16, 1955? A. Yes, I did.

Q. Do you further recall when Mr. Breen of the F.B.I. was a witness yesterday afternoon he testified that when you and he conversed, August 25, 1955, you told him when you talked to this girl named Bonnie in the early morning hours of April 16, 1955, that you told her to come out to your home, that you had a \$25.00 date for her; do you recall that testimony of Mr. Breen's?

(Testimony of Victoria Ruth Foughty Heller.)

A. I recall his testimony, yes.

Q. Did you or did you not make those statements to him in his office?

A. Not in that manner, no.

Q. Did you or did you not call Bonnie and have that conversation with her? A. I did not.

Q. What did you tell Mr. Breen in his office?

A. What happened.

Q. Did you or did you not tell Mr. Breen that you called a girl named Bonnie and told her you had a \$25.00 [456] date for her at your home?

A. Not in that manner, I did not.

Q. In what manner did you tell her?

A. I asked her and invited her out to a party.

Q. Is that what you told Mr. Breen?

A. Yes.

Q. And then what Mr. Breen testified you told him, that you called her and told her you had a \$25.00 date—Mr. Breen was not telling the truth?

A. I wouldn't for a minute attempt to say Mr. Breen was not telling the truth.

Q. Then explain it to me.

A. I am saying over a five hour conversation which I had with Mr. Breen certain little points could very easily be confused.

Q. Is this one of them?

A. Yes, this is one of them.

Q. You are confused, not Mr. Breen?

Mr. Kosher: Now, just a minute.

The Court: Just a minute. Did you make a statement, or did you ask a question?

(Testimony of Victoria Ruth Foughty Heller.)

By Mr. Guterson:

Q. (Continuing): Are you confused, or is Mr. Breen?

A. Mr. Breen is confused as to what I actually said to him. [457]

Q. Thank you. After you left the Stork Club you and Mr. McSharry and Mr. Berg and Mr. Busby, who had joined you, all went out to your home; is that correct? A. Yes.

Q. You arrived there between three or four in the morning, is that right?

A. Between two and three-thirty, I would say.

Q. You recall yesterday again when Mr. McSharry was a witness in this case, Mrs. Heller?

A. Yes.

Q. You recall that he testified that he went to bed about five in the morning, and that just before he dozed off you came into his room where he was sleeping in your home and told him Bonnie wouldn't stay unless given \$25.00; do you recall that testimony of Mr. McSharry's?

A. I do not recall his stating the time that he went to bed. I don't believe he mentioned the time that he might have gone.

Q. Do you recall when Mr. McSharry was on the witness stand he said some time in the early morning hours he went to bed at your home?

A. Yes.

Q. And that just before he dozed off you came into his room and told him Bonnie wouldn't stay

(Testimony of Victoria Ruth Foughty Heller.)
unless given \$25.00; do you recall that testimony of Mr. McSharry? [458]

A. I recall his words, yes.

Q. Now, did that conversation between you and Mr. McSharry take place? A. No.

Q. And you recall further that Mr. McSharry testified he told you that you should take a fifty-dollar bill out of his pants, which were hanging up in the room; do you recall the testimony?

A. He asked me to take it out and pay her cab fare out to my house, that he thought that was the right thing to do.

Q. Do you recall his testimony that he told you to take a fifty-dollar bill out of his pants, Mrs. Heller? A. Yes.

Q. Did that conversation take place?

A. You mean, taking—for me to take the fifty-dollar bill?

Q. Yes. A. Yes, to pay her cab fare.

Q. Not to pay her to stay? A. No.

Q. Do you recall yesterday that when your neighbor, Mrs. Margaret Keating, was a witness in this case? A. Yes.

Q. Do you recall Mrs. Keating's testimony with [459] regard to the period from the first of November of 1954 until mid-April of 1955 and her testimony that within that period that it was almost every night there was considerable traffic at all hours of the night at your dwelling; do you recall that testimony of Mrs. Keating?

(Testimony of Victoria Ruth Foughty Heller.)

Mr. Kosher: Just a moment. I object on the grounds it is improper cross examination.

The Court: I don't think proper foundation has been laid, has it? For this question?

By Mr. Guterson:

Q. (Continuing): Were you present yesterday in the court room when Mrs. Keating was a witness in this cause, Mrs. Heller? A. Yes.

Q. Do you know Mrs. Keating? A. Yes.

Q. She is your neighbor? A. Yes.

Q. She lives next door to where you live on Mercer Island? A. Yes.

Q. You recognized her when she was a witness? A. Yes.

Q. Do you recall that during the course of her testimony she testified that you moved into the neighborhood [460] about the first of November of 1954? A. Yes.

Q. Is that about the time that you did move in there? A. Yes.

Q. You further recall that she testified that during the period from the time you moved in, in early November, until mid-April, 1955, that she was conscious—I believe was the word she used—of considerable traffic at your home most every night?

Mr. Kosher: I object to that question on the ground it is improper cross examination.

The Court: Objection sustained.

By Mr. Guterson:

Q. (Continuing): Do you recall when Mrs. Keating was a witness on the witness stand yester-

(Testimony of Victoria Ruth Foughty Heller.)

day, Mrs. Heller, and she testified you came to her home in May of 1955 one evening—do you recall her testimony to that effect? A. Yes.

Q. Did you in fact visit her at her home?

A. Either in the latter part of April, or the first part of May.

Q. Do you recall Mrs. Keating testified that you asked her whether or not Miss West had come to her home on Saturday morning, April 16th? [461]

A. I did not ask her that in her home.

Mr. Kosher: Just a minute. I object to that on the grounds it is improper cross examination.

The Court: I will hear further from you why.

Mr. Kosher: Your Honor, I asked her nothing about that on direct examination.

Mr. Guterson: Your Honor,—

The Court (Interposing): That isn't the question. I will overrule the objection on that ground.

It seems to me, however, you should put some questions to this witness as to further matters before you start impeaching.

Is that what you are attempting to do or not?

Mr. Guterson: No.

The Court: Ask her the question first. What are you trying to bring out?

Mr. Guterson: I am trying to bring out her conversation with Mrs. Keating.

The Court: Well, is that an issue—the conversation?

Mr. Guterson: Well, I think it is what Mrs. Keating testified they talked about.

(Testimony of Victoria Ruth Foughty Heller.)

Q. Did you or did you not tell Mrs. Keating that you knew these things about Rose?

A. I didn't know then.

Q. Did you or did you not tell Mrs. Keating?

A. No, I did not.

Q. Thank you. A. Not all of them.

Q. Do you want to explain your answer in any way?

A. Yes. Mrs. Keating had spent some time with Rose and part of these things that were said were things that Rose had told her herself.

Q. You didn't tell her?

A. I didn't know them to tell.

Q. Now, in the early morning of Saturday, April 16, 1955, did a girl named Bonnie come to your home? A. At what hour?

Q. During the early morning hours of Saturday, [465] April 16, 1955? A. Yes.

Q. And was that the girl you had called on the telephone, Mrs. Heller? A. Invited, yes.

Q. You had invited her to your home?

A. (Witness nods in the affirmative.)

Q. And Mr. Pearce was there at your home?

A. Yes.

Q. And Mr. Busby was there? A. Yes.

A. Mr. Berg was there? A. Yes.

Q. Mr. McSharry was there? A. Yes.

Q. Rose West was there? A. Yes.

Q. And all these people stayed there throughout the whole night and slept there?

A. Only the three people from the ship slept.

(Testimony of Victoria Ruth Foughty Heller.)

Q. What was that?

A. Mr. McSharry, Mr. Pearce and Mr. Busby laid on top of the bed in the guest room.

Mr. Guterson: I believe that is all. [466]

Redirect Examination

By Mr. Kosher:

Q. Now, Mrs. Heller, with reference to the statements that you were alleged to have made to Mr. Gunn about this girl Bonnie, will you state whether or not he told you that there was a girl by the name of Bonnie who had been arrested in the Olympic Hotel for practicing prostitution?

A. Mr. Gunn?

Q. Yes. A. No.

Q. Did anybody tell you that? A. No.

Q. Now, did you ever tell anybody that this girl, Bonnie, had been arrested in the Olympic Hotel for practicing prostitution; do you under my question?

A. No, I am not really understanding it.

Q. Do you recall that when Mr. Gunn was upon the witness stand he said that when you were talking to him that you told him that you knew that Bonnie was a prostitute, and that she had practiced prostitution in the Olympic Hotel and had been arrested for that? A. No, I did not.

Q. Did he tell you that there was such a girl who had been arrested; a girl by the name of Bonnie?

A. Well, it wouldn't refer to the same person, so

(Testimony of Victoria Ruth Foughty Heller.)

By Mr. Kosher:

Q. (Continuing): Did somebody pay the cab fare for this girl Bonnie?

A. Mr. McSharry offered and wanted to pay it.

Q. Now, from time to time did you have to pay the baby sitter for this girl?

A. Many times if the woman who was going to go out with us as a foursome, if she had children, usually the gentleman would ask if he might pay the baby sitter, yes, sir. [470]

Q. Now, did you ever know any of these girls to engage in the practice of prostitution?

A. No.

Mr. Kosher: I think that that is all for the moment.

Mr. Rousso: I have no questions.

Mr. Guterson: Nothing further.

The Court: You may step down.

(Witness excused.) [471]

* * * * *

CEDRIC THEODORE BERG

upon being called as a witness for and on behalf of the defendants, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Rousso:

Q. What is your name?

A. Cedric Theodore Berg.

Q. Mr. Berg, are you a pimp?

A. No.

(Testimony of Cedric Theodore Berg.)

Q. Have you ever been a pimp? A. No.

Q. Or a procurer of women for the purposes of prostitution? A. No.

Q. What is your occupation?

A. I am a seaman.

Q. How long have you been a seaman?

A. Since 1943.

Q. When did you first meet Rose Berg Dill, approximately? A. In 1947, I think.

Q. Have you associated with her ever since that time? [476] A. Yes.

Q. When did you find out Mrs. Dill practiced prostitution?

A. I knew that the first time I met her.

Q. Would you describe the circumstances of that meeting?

A. Yes. I met her in Firebaugh.

Q. And what is Firebaugh?

A. It is a little town in California.

Q. And where was she when you met her?

A. She was working there.

Q. Working as a prostitute? A. Yes.

Q. Do you know of your own knowledge when Mrs. Dill stopped the practice of prostitution?

A. Yes. I think it was 1951 or 1952. It was during the time while I was in the Army.

Q. You were in the Army at that time?

A. Yes.

Q. Was it around the time when she had her child?

(Testimony of Cedric Theodore Berg.)

A. I think she had the child some time after that.

Q. When did you first consider marrying Mrs. Dill?

A. We talked about it then in 1952, when I was home on leave.

Q. In 1952? [477] A. Yes.

Q. You were in the Army at that time?

A. Yes.

Q. Did you make a trip to Los Banos some time in August, 1954? A. Yes.

Q. What was the purpose of that trip?

A. To get my car and my clothes.

Q. Do you have a family down there?

A. Yes.

Q. You mean by that your mother resides there?

A. Yes.

Q. Did you see Rose West Dill on that trip?

A. Yes, I did.

Q. During that trip, and I mean the trip that took place August of 1954, did you at any time suggest to Rose West Dill that she should come to Seattle and practice prostitution? A. No.

Q. Did she during that trip at any time offer to come to Seattle to practice prostitution?

A. No.

Q. Did you discuss the possibility of marriage with her on that trip? A. Yes. [478]

Q. Did you discuss the possibility of making a home in Seattle on that trip? A. Yes.

Q. When did you first meet Vicky Heller?

(Testimony of Cedric Theodore Berg.)

A. Some time around the first of the year.

Q. The first of this year? A. Yes.

Q. Could you describe the circumstances of that meeting?

A. One of the fellows off the ship was going with her at the time, and most of us come out in a couple of places on Third Avenue, and they come in there at the time, or I come in there, whichever way it come about, and I met her there.

Q. You met her at one of the cocktail lounges on Third Avenue? A. Yes.

Q. Was she going with your shipmate, Mc-Sharry, at that time? A. Yes.

Q. Now, I am speaking in regard to the period of time before your trip to Los Banos, in March of this year—in other words, from the time you first met Vicky Heller until the time you took your trip to Los Banos in March, 1955—did [479] you ever discuss prostitution with Vicky Heller?

A. No.

Q. Prior to making your trip to Los Banos in March, 1955, did you ever mention Rose Berg's name to Vicky Heller?

Mr. Guterson: Rose West.

Mr. Rousso: Excuse me. Rose West Dill's name?

A. Yes.

By Mr. Rousso:

Q. In what connection did you mention her name; what were the circumstances?

A. Well, I don't know. It was mentioned several times during a conversation when we were out and

(Testimony of Cedric Theodore Berg.)

people talking together, and I mentioned that I might get married, and it all come up in the conversation.

Q. Did you mention you might get married to Rose West? A. Yes.

Q. You mentioned that to Vicky Heller?

A. Yes.

Q. During the period of time immediately preceding this March, 1955, trip to Los Banos, did you ever suggest to Mrs. Heller that she and you should go into the prostitution business?

A. No. [480]

Q. Did she ever make such a suggestion to you?

A. No.

Q. Did you make a trip to Los Banos in March of this year? A. Yes, I did.

Q. What reason did you have for going down there?

A. Well, my mother was contemplating undergoing an operation for gall bladder, and that is why I went, and to see Rose West.

Q. And you saw Rose during that trip?

A. Yes, I did.

Q. I would like to call your attention to the evening of March 19th of this year, which I believe to be a Saturday night. On that evening did you and Rose West go to a night club in Los Banos?

A. Yes.

Q. What was the name of that club?

A. The 152 Club.

Q. Now, were you people alone during the

(Testimony of Cedric Theodore Berg.)

course of that entire evening, or were there other people with you?

A. There were several others.

Q. Do you remember the names of any of them?

A. Yes; Bill Reno was one.

Q. What was that name? [481]

A. Billy Reno. He was the bartender in the 152 Club.

Q. He joined your party? A. Yes, he did.

Q. Do you remember the names of any other people that were present?

A. Yes, Lonnie Chappel, which was my ex-wife.

Q. Your ex-wife? A. Yes.

Q. Now, in the presence of those people did you and Rose West have any conversation in regard to marriage? A. Yes.

Q. Do you recall any part of Rose West's conversation at that time?

A. Yes, she told them she was planning to come up to Seattle, and that we were going to get married.

Q. Now, during this second trip, that is, the trip in March, 1955, did you ever suggest that Rose West should come to Seattle to practice prostitution? A. No.

Q. Did you ever state to Rose West during this trip that you would provide her with money for the purpose of coming to Seattle to practice prostitution? A. No.

Q. Did you ever state to Rose West during this

(Testimony of Cedric Theodore Berg.)

trip [482] that you would provide a place for her to practice prostitution in Seattle? A. No.

Q. Did you in any way attempt to induce or entice Rose West to come to Seattle to practice prostitution while you were in Los Banos?

A. No.

Q. When did you get back to Seattle from Los Banos—approximately?

A. It was the last Tuesday in March; about the 28th or 29th. I am not sure about which date it was.

Q. When did you go and live at the Heller residence?

A. About the 1st of March; it was on a Friday.

Q. What were the circumstances of your going out there to live; why did you go out there to live?

A. Well, on the evening I was invited to stay out there I got off the ship at five o'clock, and I stopped in the Sportsman; and Mrs. Heller and Mr. Bostock and Gerry Scheurman came in there, and I was *taking* to a friend about moving out of the Moore Hotel on account of the rent being too high. And they came in, and we sat down and had a drink, and we got to talking, and it came up I was going to move because I was paying too much rent at the Moore Hotel, and Mrs. Heller invited me to stay out there until the ship came back in. [483]

Q. You came back to Seattle on March 28th? Did you start working at that time?

A. The next morning.

Q. Where?

(Testimony of Cedric Theodore Berg.)

A. I was working relief on one of the ships here in port.

Q. On an M.S.T.S. ship here in town?

A. Yes.

Q. Now, had you previously sailed on the General Polk? A. Yes.

Q. And the General Polk—was that out at sea at this time? A. Yes, it was.

Q. What was the reason for your not making the last trip; the trip, in other words, that the General Polk was then on?

A. I got off on account of my mother being sick, and I wanted to go home and be sure that everything was all right.

Q. You went to live out at the Heller residence then right around the first of April of this year?

A. Yes.

Q. Now, from that time—from the first of April until the time that Rose West Dill arrived in [484] Seattle—that would be about the 13th of April—during that period did you witness any acts of prostitution at the Heller residence? A. No.

Q. During that period of time, did you ever state to Mrs. Heller that Rose Berg—excuse me—Rose West Dill—might be coming up to Seattle?

A. Yes.

Q. Now, did you state why she might be coming up to Seattle? A. Yes.

Q. And why—what was the reason?

A. We were going to get married.

Q. Now, commencing around the 7th of April

(Testimony of Cedric Theodore Berg.)

of this year, did you have occasion to make some telephone calls to Los Banos, California?

A. Yes.

Q. Did you make those calls to Rose West?

A. Yes, I did.

Q. Now, what was the purpose of those calls?

A. Well, I told her after I got back up here that I would call her as soon as I could find a place to live.

Q. Now, in your first call, did you tell her that you had found a place or were looking for a place?

A. I told her I was looking for a place. [485]

Q. How long after the first call did you make your second telephone call?

A. One or two days later; maybe three.

Q. What was the reason for the second telephone call?

A. Well, she said she was coming up, and she didn't show up, so I called again.

Q. Now, did you make any other calls?

A. Yes, I made four or five calls, altogether.

Q. And those subsequent calls, approximately, as well as you can remember now, what was the topic of your conversation?

A. Oh, I don't remember exactly what was said.

Q. Did you, during the course of any of those calls, suggest to Rose West that she should come up to Seattle to practice prostitution? A. No.

Q. Did you, during the course of any of those calls, state to Rose West you would furnish money

(Testimony of Cedric Theodore Berg.)

to her to come up to Seattle to practice prostitution? A. No.

Q. Did you ever send a money order to Rose West? A. Yes.

Q. Was that for \$60.00?

A. Yes, it was. [486]

Q. Was that sent on approximately April 7th of this year?

A. No, it was sent April 6th.

Q. Was that a Western Union money order?

A. Yes, it was.

Q. Where did you get the money?

A. I borrowed it.

Q. Did you pay back the money?

A. Yes, I did.

Q. That you borrowed? A. Yes, I did.

Q. When did you pay that money back?

A. I borrowed it on Wednesday, and I paid it back on Friday.

Q. Where did you get the money on Friday?

A. I had some checks coming from M.S.T.S.

Q. You used that money to pay back the loan you received on Wednesday? A. Yes, I did.

Q. Now, why did you send that money to Rose West Dill?

A. Well, when I first called her, she stated that—I asked her if she needed any money, and she stated she didn't need any, that she had enough to come up on; and then on the second or third time I called her, she said she [487] said she wanted to pay some phone bills, and pay the woman who

(Testimony of Cedric Theodore Berg.)

was taking care of her child, and had to pay some rent before she left.

Q. Did she state during the telephone conversation that she wanted to use the money to provide herself with transportation to Seattle?

A. No, she didn't.

Q. Was it your intention in providing the money for Rose West that she use the money to come to Seattle?

A. Well, she could use the money for anything she wanted, as far as that was concerned.

Q. It was your thought, however, that the money was to be used to pay her fare?

Mr. Guterson: Your Honor, I object. He can ask what was said.

The Court: Objection sustained.

The question and answer will be stricken and the jury will disregard it.

By Mr. Rousso:

Q. I call your attention to the morning of April 13th of this year. Did you receive a phone call?

A. Yes.

Q. And that was from Rose West?

A. Yes, it was.

Q. Where was she calling from? [488]

A. From the airport, I guess.

Q. And what did you tell Miss West?

A. I told her we didn't have a car, and that she would have to come out in a cab.

Q. Did you give her the address on Mercer Island?

A. Yes, I did.

(Testimony of Cedric Theodore Berg.)

Q. She arrived out there in a cab?

A. Yes.

Q. What was her condition when she reached the house? A. Well, she was pretty drunk.

Q. Now, she arrived there at approximately what time in the morning?

A. Oh, I would say around—between six and eight, some time.

Q. You were awake at that time?

A. Yes, I was.

Q. Were the Heller children in the house at that time? A. Yes, they were.

Q. Did they go to school that morning?

A. Yes, they did.

Q. At about what time was that?

A. About 7:30, I guess.

Q. And you were still in the house at that time?

A. Yes.

Q. Did you leave the Heller house that day?

A. Yes.

Q. At approximately what time of the day was that? A. Some time before noon.

Q. Some time before noon? A. Yes.

Q. Did you observe any acts of prostitution in the Heller residence between the time of Rose West's arrival and the time you left the house that day? A. Absolutely not.

Q. Were you in a position to know whether any acts of prostitution took place during that period?

Mr. Guterson: I will object, your Honor, to the form of the question. He can ask him every-

(Testimony of Cedric Theodore Berg.)

thing he did, and let the jury decide what position he was in.

The Court: Objection overruled.

A. No, there were no acts of prostitution.

The Court: That wasn't the question.

Mr. Rousso: Would you read the question, please?

The Court: Mr. Reporter, read the question.

(Whereupon, the preceding question was read by the reporter.)

A. (Continuing): Yes, I was.

By Mr. Rousso: [490]

Q. And did any acts take place? A. No.

Q. Do you recall approximately what time you got home that night. By "home," I mean back to the Heller residence?

A. About nine o'clock.

Q. Did you remain home the remainder of the evening?

A. I don't know whether I did or not.

Q. Did you do any drinking that evening?

A. Yes, I did.

Q. Were you joined in that drinking by Rose West? A. Yes.

Q. Now, from the time you got home that night until the next morning when you awoke, to your knowledge were there any acts of prostitution performed in the Heller house? A. No.

Q. Then on Thursday morning, did the Heller children go to school? A. Yes.

Q. What time did you leave the house that morning? A. I don't remember.

(Testimony of Cedric Theodore Berg.)

Q. Approximately—do you have some idea? Was it before or after noon?

A. Possibly before noon. It may have been in the afternoon. I am not sure. [491]

Q. From the time you got up that morning, until the time you left the house, to your knowledge were there any acts of prostitution performed in that house?

A. No, I was the only one there besides Mrs. Heller and Rose West.

Q. Now, on that Wednesday, the date of her arrival, or on that Thursday prior to the time you left for downtown, did Rose West ever give you any money? A. Never.

Q. Did she at any time ever give you any money? A. No.

Q. Now, what time did you get home Thursday night, approximately?

A. I don't remember what time it was.

Q. Well, was it before six in the evening, or after six in the evening?

A. I don't even remember that.

Q. Did you remain home Thursday evening?

A. Yes, I think so.

Q. Now, from the time you got home Thursday evening until the time you went to bed that night, or early Friday, did you observe any acts of prostitution in that house? A. No.

Q. To your knowledge were there any acts of [492] prostitution performed in that time?

A. No.

(Testimony of Cedric Theodore Berg.)

Q. Now, what time did you get up Friday morning?

A. I got up early Friday morning — around seven or eight o'clock.

Q. What time did you leave the house that morning?

A. I left there approximately around 8:30.

Q. Now, between the time you arose at approximately seven, and the time you left the house, at approximately eight-thirty, to your knowledge were there any acts of prostitution performed in that house? A. No.

Q. Where did you go when you left the house that morning? A. Down to Pier 39.

Q. What was your purpose in going to Pier 39?

A. I went down to the pier to meet the ship. It was docked, and I had clothes on the ship, and some of the fellows owed me money, and I had a lot of friends there.

Q. Do you recall where you went when you left the ship? A. Yes. I went to the Sportsman.

Q. Were you with anybody when you went to the Sportsman? A. No. [493]

Q. Did you subsequent to that time meet anybody at the Sportsman? A. Yes.

Q. Who did you meet?

A. I met George Pearce and Bob McSharry.

Q. What did you do after that?

A. We drank there for a while, and went down to the Northern Lights and drank some more.

(Testimony of Cedric Theodore Berg.)

Q. Did you meet anybody else during those trips?

A. Not until later in the evening.

Q. Now, that evening you came down town from Mercer Island, early that evening?

A. Yes, we went out there some time during the afternoon, and then we came back down town.

Q. You came back down town? Who came back down town?

A. Well, George and myself and Mrs. Heller. I believe that is all. And Rose came with us.

Q. Did Vicky come down too? A. Yes.

Q. What did you people do when you came down town the second time?

A. We went back to the Sportsman and the Northern Light.

Q. Some time later that evening, say around nine to nine-fifteen, did you go back to the Heller residence? [494]

A. Yes, we did.

Q. Who went back to the Heller residence?

A. It was myself and George and Rose and Vicky; that was all.

Q. Now, later that evening you again left that residence?

A. Yes.

Q. Did anyone remain there?

A. Yes; George and Rose.

Q. What was George Pearce's condition when you left the house at that time?

A. He was drunk, and couldn't walk.

Q. What was Rose West's condition?

A. She was pretty drunk too.

(Testimony of Cedric Theodore Berg.)

Q. Did you state to her you would like her to come back to town with you? A. Yes, I did.

Q. What was her reply?

A. She didn't want to come back to town.

Q. Now, after you left the house that night, what did you do? A. I went back down town.

Q. And then what?

A. I went to various places, and had a few drinks.

Q. Did you end up at the Stork Club? [495]

A. Yes.

Q. What time did you get back to the Heller residence from the Stork Club?

A. Two or three o'clock in the morning.

Q. Who came back to the house with you from the Stock Club?

A. Bob McSharry, Busby, George—not George—Mrs. Heller and myself, and that is all.

Q. Now, when you got back to the house, approximately what time in the morning was it?

A. I said about two or three o'clock in the morning.

Q. What was George Pearce doing?

A. He was sitting up in the kitchen.

Q. Was he drinking? A. Yes.

Q. And Rose West—what was she doing?

A. She was sitting in there with him, drinking.

Q. Were you present at the Heller residence when a woman by the name of Bonnie arrived?

A. Yes.

Q. Had you ever seen this woman before?

(Testimony of Cedric Theodore Berg.)

A. No.

Q. Have you ever seen her since? A. No.

Q. To the best of your knowledge, did she commit any [496] acts of prostitution while she was at the Heller residence that night? A. No.

Q. Now, on that Friday evening, and until Saturday morning, during the period of time you were awake, did you of your own knowledge know whether any acts of prostitution took place in the Heller residence? A. No.

Q. None did? A. None did that I know of.

Q. Now, did you go to sleep at all that night?

A. No, I didn't.

Q. What did you do?

A. I sat up and drank and talked and shot dice.

Q. Some time in the morning of Saturday, April 16th, was it brought to your attention that Rose West Dill had removed some money from somebody's wallet? A. Yes, it was.

Q. Did you have a conversation with Rose West Dill at that time? A. Yes, I did.

Q. Do you recall what you said to her at that time?

A. I asked her to put the money back, and she refused.

Q. Did you examine any of the wallets? [497]

A. Yes, I did.

Q. Whose wallet did you examine?

A. Busby's.

Q. Did you place any of your own money in Mr. Busby's wallet?

(Testimony of Cedric Theodore Berg.)

A. Yes, I did. I put fifty dollars in.

Q. What was your reason for doing that?

A. I didn't want him to think that a girl friend of mine would steal their money from them, and it was pretty embarrassing.

Q. How did you know he was short \$50.00?

A. Well, Mrs. Heller came out and told me Rose had the wallet, and there were seven fifty-dollar bills, and two twenties in it.

Q. Some time after you put your fifty dollars in Mr. Busby's wallet, did you find out that Rose West Dill had gone back into the room where Busby was sleeping? A. Yes.

Q. Did you check the wallet again?

A. Yes.

Q. Was there money missing again?

A. Yes.

Q. Did you talk to Rose West about that?

A. Yes.

Q. Do you recall the substance of your conversation? [498]

A. Yes; I accused her again of taking the money.

Q. Did you take the money back from her?

A. No.

Q. You never got any part of that money back?

A. I never got it back. She voluntarily herself gave it to Mrs. Heller.

Q. Where was that money?

A. In her mouth.

(Testimony of Cedric Theodore Berg.)

Q. And what did you do with the money after you got it?

A. I washed it off and put it back in the wallet.

Q. Now, shortly thereafter did she leave the house?

A. Maybe another hour or an hour and a half later.

Q. Did she, or at the time she left the house, were you aware that she had left?

A. I was in the kitchen, and she was sitting in the dining room drinking coffee, talking to somebody; and there was a couple of them sitting there, but she got up and left, and went out through the patio.

Q. After the episode that evening, was it still intended between you and Mrs. West—

Mr. Rousso: Withdraw that question. I will restate it.

By Mr. Rousso: [499]

Q. (Continuing): Had you at any time stated on that morning to Mrs. West that you did not intend to marry her?

A. No, the subject was never brought up.

Q. Did you at any time state to anybody that morning that she was just a little tramp; or words to that effect? A. I may have.

Q. What was your reason for using such language? A. I was pretty mad.

Q. Now, yesterday were you present when an agent of the Federal Bureau of Investigation testified? A. Yes, I was.

(Testimony of Cedric Theodore Berg.)

Q. Did you recognize him as being the man that came down and interviewed you down at the county jail? A. Yes.

Q. So far as you remember, his name was Mr. Crisman?

A. I don't remember his name, but I recognized the man.

Q. You recognize the man? A. Yes.

Q. Now, he testified in regard to a conversation he had had with you at the jail at the time he came down, is that correct? [500] A. Yes.

Q. Now, in substance, was his recitation of what you stated to him accurate? A. Yes.

Q. Now, during his testimony Mr. Crisman said that you had stated to him in substance that you wanted Rose Dill to come up to Seattle for the purpose of marrying her? A. Yes.

Q. Now, in substance, is that a correct description of your conversation with him? A. Yes.

Mr. Rousso: I have no further questions.

Cross Examination

By Mr. Kosher:

Q. Now, you say you have been a seaman for a number of years? A. Yes, I have.

Q. And have you worked steadily at that business?

A. Yes; as much as possible. I have been in the Army, and I worked for my uncle for a while.

Q. When were you in the Army?

A. From 1951 to 1953.

(Testimony of Cedric Theodore Berg.)

Q. Where did you serve?

A. At Fort Ord, Fort Bragg, and Fort Benning, Georgia.

Q. And you served honorably? [501]

A. Yes.

Q. And your home is at Los Banos?

A. Yes.

Q. Your mother was there? A. Yes.

Q. What kind of work did you do there?

A. I worked at the P. G. and E. for six months, and for my stepfather.

Q. Have you ever accepted any earnings from any prostitutes? A. No, I never have.

Mr. Guterson: I think this is repetition.

The Court: Objection sustained.

You may examine as to matters relating to Mrs. Heller.

By Mr. Kosher:

Q. You testified you had some telephone calls to Los Banos, California, is that correct?

A. That is right.

Q. Do you recall these telephone calls generally?

A. Yes.

Q. And were some of them made from the Heller residence? A. Yes, they were.

Q. Now, at any time when you made these telephone calls [502] did Mrs. Heller talk on the telephone? A. No.

Q. Did you ever introduce Mrs. Heller over the telephone, if such is a possibility, to Miss Dill down in California? A. No.

(Testimony of Cedric Theodore Berg.)

Q. Now, during the time you were living at Mrs. Heller's house, did you know that place to be a house of prostitution? A. No.

Q. Had you ever known Mrs. Heller to have any call girls working for her? A. No.

Q. Did you ever know Mrs. Heller herself to practice prostitution? A. No.

Q. Did you ever have any conversation with Mrs. Heller about bringing Rose up here for the purpose of practicing prostitution? A. No.

Q. Was anything ever said at any time during the time you knew Mrs. Heller about bringing Rose up here for the purpose of practicing prostitution?

A. No.

Mr. Kosher: That is all. [503]

* * * * *

Cross Examination

By Mr. Guterson:

Q. Mr. Berg, it is your testimony, is it, sir, that when you first met Rose West in 1947 she was employed as a prostitute? A. Yes.

Q. When did you go into the service?

A. In 1951.

Q. And from 1947 to 1951, was your home in Los Banos, California? A. Yes.

Q. And during that period of three or four years, was Rose West living in Los Banos, or else in Firebaugh, close by? [505]

A. To the best of my knowledge.

Q. Did you know her during the course of those three or four years? A. Yes.

(Testimony of Cedric Theodore Berg.)

Q. And during that time was she occupied and employed as a prostitute? A. I don't know.

Q. But you know that she was in 1947?

A. Yes.

Q. Do you know whether she was in 1948?

A. No, I don't know.

Q. Did you see her in 1948? A. Yes, I did.

Q. Did you see her in 1949? A. Yes.

Q. And the year 1950? A. Yes, I think so.

Q. And in 1949 and 1950, did you know whether or not she was employed as a prostitute?

A. No, I didn't.

Q. You didn't know what she was doing?

A. No.

Q. Did you see her quite a bit?

A. No; I just seen her now and then.

Q. Did you visit Rose in August of 1954? [506]

A. Yes, I did.

Q. And that was in Los Banos?

A. Yes, it was.

Q. Did you visit Rose again in March, 1955?

A. Yes, I did. And——

Q. And that was in Los Banos? A. Yes.

Q. Before you made your trip to Los Banos in March, 1955, had you discussed Miss West with Mrs. Heller? A. Yes, I did.

Q. Did Mrs. Heller know you were going to Los Banos? A. Yes, she did.

Q. Did she know you were going to see Rose West?

(Testimony of Cedric Theodore Berg.)

A. I never mentioned whether I was going to see Rose West or not.

Q. Excuse me?

A. I don't think I mentioned whether I was or not going to see Rose West.

Q. Did you see Rose West? A. Yes, I did.

Q. Had you been living at Mrs. Heller's home before you made your trip to Los Banos?

A. No.

Q. Now, you recall on Tuesday, Mr. Berg, when Miss [507] West was a witness in this case?

A. Yes, I do.

Q. Do you recall her testimony that when you visited her in March of 1955 in Los Banos, you told her to come on up to Seattle, and that you had a place to stay for her, at a woman's home named Vicky; do you recall that testimony?

A. Yes, I recall her testimony.

Q. Did you have such a conversation with Miss West? A. No, I didn't.

Q. And you returned to Seattle approximately the 28th of March, is that right? A. Yes.

Q. You met Mrs. Heller in a bar you had frequented before, and where you had seen her?

A. Yes.

Q. And she invited you to stay at her home?

A. Yes, she did.

Q. And you accepted her offer? A. Yes.

Q. Did you live there and stay there as if it was your home from the 28th of March until the 15th of April?

(Testimony of Cedric Theodore Berg.)

A. It wasn't from the 28th of March. I didn't go out there until—I believe it was on the first.

Q. First of April? A. Yes.

Q. Did you live there from the first of April until the 15th of April? A. Yes.

Q. And the 16th of April also? A. Yes.

Q. Did you first call Rose West early on a Sunday morning?

A. Yes; I believe it was on a Sunday morning.

Q. Did you place that call from Mrs. Heller's home? A. Yes, I did.

Q. Was that call placed at approximately 6:22 in the morning on a Sunday?

A. Yes, it might have been.

Q. Was Mrs. Heller in the home at the time?

A. I think she was in bed.

Q. Excuse me?

A. I think she was in bed.

Q. Where was the telephone in the home?

A. It was in the living room.

Q. She wasn't in the living room?

A. No, she wasn't.

Q. Did you speak to Rose West on that occasion? A. Yes, I did. [509]

Q. Did you ask her to come to Seattle?

A. Yes, I did.

Q. Was this the first telephone call that you made from Seattle to Los Banos after your return from your trip? A. Yes, I believe so.

Q. Now, I will ask you whether or not during

(Testimony of Cedric Theodore Berg.)

the course of that conversation did you introduce Miss West to Mrs. Heller?

A. I don't know what you are trying to get at.

Q. Did Mrs. Heller speak on the telephone?

A. No, she didn't.

Q. Did you speak to Miss West about Mrs. Heller? A. On the telephone?

Q. Yes. A. Yes, I may have.

Q. What did you say?

A. I think I told her I was living with some friends of mine, and that they were helping me find a place for her to live.

Q. Who were the friends?

A. Well, Mrs. Heller, and Gerry Scheurman.

Q. Anyone else? A. No.

Q. Gerry Scheurman was living there also?

A. No, she wasn't living there. [510]

Q. Then it was just Mrs. Heller and yourself?

A. Yes.

Q. Just a friend—not "friends"?

A. What I meant by that was, friends was helping me find a place to live.

Q. I am asking you what you told Miss West?

A. Yes; basically. I don't remember the exact words.

Q. I think you spoke to her about 12 minutes; does that sound about right?

A. Yes; I think I might have.

Q. Now, do you recall, Mr. Berg, yesterday afternoon and yesterday morning when Mr. Gunn of the F.B.I. was a witness in this case?

(Testimony of Cedric Theodore Berg.)

A. Yes, I do.

Q. Do you recall that he testified to the conversation which you had with Mrs. Heller on March 28th, or April 28th, 1955? A. Yes.

Q. Do you recall that Mr. Gunn testified that during the course of that conversation with Mrs. Heller, that she told him that on this early Sunday morning call she spoke to Miss West?

Mr. Kosher: I object to that on the grounds it is improper cross. [511]

The Court: Objection sustained.

By Mr. Guterson:

Q. Did Miss West during the course of your conversation agree to come to Seattle?

A. Yes, she said she would come.

Mr. Rousso: Will you relate that to a time and place, counsel?

By Mr. Guterson:

Q. Sunday morning, April 3, 1955.

A. Yes, she did.

Q. Do you recall when it was the next time you talked to Miss West on the phone?

A. No, not the day.

Q. Did you ever make any calls to Miss West in Los Banos from a place other than Mrs. Heller's home? A. Yes, I did.

Q. Do you recall where you made those calls at?

A. Yes, I believe one of them was down at Pier 39 or in a service station right next to it.

Q. Did you pay for those calls yourself?

A. Yes, I did.

(Testimony of Cedric Theodore Berg.)

Q. And they were made at a pay phone?

A. Yes, they were.

Q. During the course of the second conversation you had with Miss West, you say that was a couple of days later? [512]

A. Maybe the next day or a couple of days later. I don't remember how much time elapsed in between.

Q. Did you discuss anything having to do with money with Miss West?

A. Yes, it was on the second or third call we discussed that.

Q. Did she say she didn't have enough money to come to Seattle?

A. No, she said she needed money to pay some bills with, baby sitter and telephone bill and rent.

Q. Were you discussing at that time whether or not she would come to Seattle?

A. Yes, we were.

Q. I hand you Plaintiff's Exhibit 2, Mr. Berg. Is the penciled printing on that document yours?

A. Yes, it is.

Q. Did you make that out at the Western Union office in Seattle? A. Yes, it is.

Mr. Rousso: Your Honor, it has been admitted Mr. West sent a \$60.00 money order. We have no objection to that being in as sent by him.

The Court: It is already in evidence.

Mr. Guterson: Yes. [513]

Mr. Rousso: Yes. I mean Mr. Berg.

(Testimony of Cedric Theodore Berg.)

By Mr. Guterson:

Q. That is your writing, Mr. Berg?

A. Yes, it is.

Q. Did you make that out at the Western Union office?

A. Yes.

Q. Do you recall Mrs. Fick, the lady who testified and stated she waited on you; do you remember her?

A. No.

Q. Do you remember giving whoever served you \$60.00?

A. Yes, I gave more than \$60.00.

Q. \$61.96?

A. Yes.

Q. Did you pay that in cash?

A. Yes, I did.

Q. At the bottom of this telegram, is this also in your writing, where it says, "her own phone number 2404"?

A. Yes.

Q. You supplied that information?

A. Yes.

Q. That is the phone you have been calling?

A. Yes.

Q. And then you say that because she didn't come [514] right away on the 7th of April, you made two or three more phone calls?

A. Yes.

Q. Were those made from Adams 5680?

A. Yes; two or three of them were made from there.

Q. That was Mrs. Heller's phone?

A. Yes, it was.

Q. During any of these conversations from Mrs. Heller's home, was Mrs. Heller at the house?

(Testimony of Cedric Theodore Berg.)

A. Yes; she could possibly have been there on all of them. I don't remember whether she was in the house or not.

Q. Is it your testimony, sir, that on no occasion did she speak on the phone?

A. Yes, it is.

Q. Did you advise Miss West of Mrs. Heller's phone number? A. Yes, I did.

Q. Did you tell Miss West to call Mrs. Heller?

A. No, I didn't.

Q. When she arrived in Seattle?

A. No. I told her to call when she got in.

Q. Excuse me.

A. I did tell her to call when she got in.

Q. To call Adams 5680? [515] A. Yes.

Q. Now, you testified, I believe, Mr. Berg, that during the time you visited Miss West in March of 1955 at Los Banos, you spent one night at some club with some of your friends? A. Yes.

Q. And that during the course of your evening together you and Miss West discussed marriage?

A. Yes, we did.

Q. In the presence of your friends?

A. No, she told them herself.

Q. She told your friends? A. Yes.

Q. In your presence? A. Yes.

Q. Now, do you recall that on the 12th of May you had this conversation at the jail with Mr. Crisman of the F.B.I.? A. Yes, I do.

Q. Did you discuss this matter with Mr. Crisman?

(Testimony of Cedric Theodore Berg.)

A. No, I don't know whether I did or not.

Q. Did you advise him as to this conversation in your presence that Miss West had with two or three of your friends in Los Banos?

A. No. [516]

Q. Did you speak on the phone with Miss West early in the morning of Wednesday, April 13, 1955?

A. Yes, I did.

Q. And she arrived at the home of Mrs. Heller shortly after that talk?

A. Yes, she did.

Q. Do you recall whether she slept that morning or stayed awake?

A. I believe she went to bed about some time after ten o'clock.

Q. Do you recall whether Mrs. Heller was at the home?

A. Yes, she was.

Q. Do you recall whether Mrs. Heller stayed at the home during the early morning hours?

A. We left some time that morning before noon or around noon.

Q. When you say "we," who do you mean?

A. Mrs. Heller and myself.

Q. Miss West stayed at the home?

A. Yes.

Q. And you were gone during the course of the day and came back about nine o'clock at night?

A. Yes.

Q. And was that the day you were looking for automobiles? [517]

A. Yes.

Q. You spent some time at the Firelight Room at the Moore?

A. Yes.

Q. Miss West wasn't with you at all?

(Testimony of Cedric Theodore Berg.)

A. No, she wasn't.

Q. And the following day did you and Mrs. Heller go out again? A. No.

Q. What did you do on Thursday?

A. I stayed home most of the day.

Q. Excuse me?

A. I stayed home most of the day.

Q. On Friday morning you say you borrowed Mrs. Heller's car to go down to the ship, is that correct? A. Yes.

Q. Were you away most of the day on Friday?

A. Yes, until some time late in the afternoon.

Q. Yes. During the day? A. Yes.

Q. Was Miss West with you?

A. No, she wasn't.

Q. And when you came home, then, did all of you go downtown? [518] A. Yes.

Q. Miss West, Mrs. Heller, and yourself?

A. Yes.

Q. And later that evening you returned home and left Miss West there and you and Mrs. Heller returned again? A. Yes.

Q. You went down town and returned about three in the morning with Mr. McSharry and Mr. Busby? A. That is right.

Q. And during the course of that night Miss West wasn't down town with you?

A. No, she wasn't.

Q. Was it early on Friday evening that you went down town; was that the only time during the

(Testimony of Cedric Theodore Berg.)

three or four days that Miss West was here that she accompanied you when you left the home?

A. Yes, I believe it was.

Q. The rest of the time you either left her alone or with Mrs. Heller? A. Yes.

Q. And whichever way it was, Miss West did not go with you.

A. She may have went some other time; I don't remember exactly. [519]

Q. When you left Miss West at the Heller home when you and Mrs. Heller left Friday evening, was Mr. Pearce there? A. Yes, he was.

Q. Mr. Pearce came out to the home with Mrs. Heller at three o'clock, and both he and Miss West had been drinking considerably? A. Yes.

Q. And you say Mr. Pearce passed out?

A. Yes, he did. No, he didn't pass out, exactly, but he was pretty drunk.

Q. During the times that you and Mrs. Heller were away during Friday, do you know who was at home with her children?

A. No, I don't know.

Q. Excuse me? A. No, I don't know.

Q. Did you see her sister there?

A. I don't know that she has a sister.

Q. Her sister-in-law?

A. Yes, I believe she was there that day.

Q. You think she was there?

A. She might have been.

Q. Now, when you returned to the home about three o'clock on Saturday morning with Mr. Mc-

(Testimony of Cedric Theodore Berg.)

Sharry and Mr. Busby, [520] was Miss West there?

A. Yes, she was.

Q. Did you introduce her to Mr. McSharry and Mr. Busby? A. I imagine I did.

Q. They had never seen her before, had they?

A. No.

Q. As far as you know?

A. As far as I know.

Q. That was the first time they were at the house while Miss West was there? A. Yes.

Q. And did you introduce Miss West to them as your wife?

A. I don't think so. I don't think so; I may have.

Q. How did you introduce her?

A. I don't remember exactly how I introduced her. That is five months ago.

Q. Do you recall when Mr. McSharry was on the witness stand yesterday, Mr. Berg?

A. Yes, I do.

Q. Do you recall when he testified, he testified that when he arrived at the home at three in the morning, you introduced Rose West as your wife?

A. Yes.

Q. Do you recall that? A. Yes.

Q. Is that how you introduced him?

A. I don't know.

Q. Do you recall after Rose left the home about ten-thirty or eleven on Saturday morning, you went out looking for her? A. Yes.

Q. Do you recall those events? A. Yes.

(Testimony of Cedric Theodore Berg.)

Q. Did you go to the home of Mrs. Keating, who has been a witness in this case?

A. Yes, I did.

Q. Now, when you came to Mrs. Keating's door, did you ask Mrs. Keating whether or not your wife was there?

A. Yes, I did.

Q. On Saturday morning before Rose left the home, were you in the kitchen and in the dining room with Mrs. Heller and Mr. McSharry during part of that period when Rose was sitting at the dining room table?

A. Yes.

Q. Do you recall whether or not Mr. McSharry asked you how it was that you permitted that type of conversation to go on in front of your wife?

A. I don't recall what he asked me.

Q. Do you recall him testifying to that fact?

A. Yes, I do.

Q. You don't recall whether he said that or not?

A. Who said what?

Q. Do you recall whether or not Mr. McSharry asked you how come you permitted that type of conversation to go on in front of your wife?

A. I don't recall that.

Q. He may have asked you that?

A. Yes, he may have asked me that.

Q. And did you tell him, "She is just a tramp from Frisco"?

A. I may have.

Q. Did you arrange with Miss West before she came to Seattle that she should come by airplane?

A. No.

(Testimony of Cedric Theodore Berg.)

Q. And did Mrs. Heller ever state to you that she would like Rose West to come to Seattle for purposes of prostitution? A. No.

Q. Now, you also stated that you had friends, meaning Vicky Heller and Miss Scheurman, I understand, who helped you find a place to live?

A. Yes.

Q. Was your residence at the Heller home only temporary, then? A. Yes, that is right.

Q. And when did you intend to leave that residence?

A. As soon as I found a place to live.

Q. And as soon as you found a place to live, did you also intend to get married? [526]

A. Yes, I did.

Q. Now, a further question was asked, whether you had ever told Rose West in one of your telephone conversations to call Vicky Heller when she got to town.

Now, did you tell Rose West to call Vicky Heller, or did you tell Rose West to call you at Vicky Heller's home?

A. I told her to call Adams 5680.

Q. You didn't tell her to specifically call Vicky Heller? A. No.

Q. Saturday morning, then, you went to Mrs. Keating's home? A. Yes.

Q. Do you recall? A. Saturday morning.

Q. Do you recall why you went there?

A. Yes, to see if Rose went over there. She left, and didn't have a coat on, or anything.

(Testimony of Cedric Theodore Berg.)

Q. And why did you want to see Miss West?

A. I wanted to talk to her.

Q. Now, in regard to that Friday evening or early Saturday morning, being the 15th or 16th of April, you testified there were several gentlemen not from the Polk present, is that correct? [527]

A. That is right.

Q. Can you tell me what those gentlemen were doing while they were there?

A. Oh, drinking; some of them were shooting dice.

Q. To your knowledge did any of those gentlemen, or any of the gentlemen from the Polk, engage in any acts of sexual intercourse while they were there that night? A. No.

Mr. Rousso: I have no further questions.

Recross Examination

By Mr. Kosher:

Q. Just one question, if I might ask:

Isn't it a fact that during the three days that Rose was here, the three or four days that she was here, that everybody concerned was doing a lot of drinking? A. Yes, we were.

Mr. Kosher: I think that is all.

Mr. Guterson: I have nothing further.

Mr. Rousso: That is all.

(Witness excused.) [528]

* * * * *

The Court: Ladies and gentlemen of the jury: You have listened patiently for the last three days almost now to the testimony, much of which has been sordid and revolting, which happens when we have cases of this kind. That does not in any way detract from the right of any defendant to a fair and impartial trial, even though the facts brought forth may serve to developed to be sordid, and, as I say, revolting.

Having heard that testimony and the argument of counsel the Court will now instruct you as to the law, and as you should apply it to the facts.

I think all of you, with the exception of one or two, have served in criminal cases before, and you know the instructions do not go with you to the jury room, and, therefore, you will have to call upon your recollection of the Court's instructions as to the law, and interpret them to the facts as you find the facts from the evidence when you go to the jury room. [611]

You are to be guided by these rules of law as the Court gives them to you, applying them to the facts. They are to be understood by you as a whole. They are to be interpreted and applied by you as a connected body and as an entirety. You should not single out one instruction as stating the law but, again, consider them as a whole.

Apart from any opinion you may have as to what the law is, or what it ought to be, it is your obligation under your oath to take and accept the law as the Court gives it to you in these instructions.

At the outset the Court read the indictment to you, and as you will recall and as I will advise you later, these defendants were indicted by the Grand Jury, and they entered a plea of not guilty to the charges contained therein, and that means that they deny each and every material allegation contained in the indictment.

By pleading not guilty they place upon the government the burden of proving beyond a reasonable doubt every material allegation contained in the indictment. The indictment itself is but a formal method of accusing the defendant of a crime. It is not evidence of any kind against them. It does not create any presumption, nor permit any inference, of guilt. Rather, the law presumes every defendant to be innocent until he or she is proven [612] guilty by the evidence beyond a reasonable doubt.

This presumption is not a mere matter of form, but is a substantial right of every defendant, and this presumption continues throughout the entire trial and until such time as you have found that it has been overcome by the evidence beyond a reasonable doubt.

It is your duty and you have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the plea of not guilty entered by the defendants.

You are to perform this duty without prejudice, bias or sympathy. The punishment provided by law for the offense charged in the indictment is a

matter exclusively within the province of the Court, and it is not to be considered by the jury in determining and arriving at an *impartial* as to the guilt or innocence of the defendants.

I have used the term "reasonable doubt." That term means in law just what the words imply, a doubt based upon some good reason. It is one that must arise from the evidence or which may just as well arise from the lack of evidence in the case. It must be a substantial doubt, one which an honest, sensible, fair-minded man or woman might with reason entertain consistent with a conscientious desire to ascertain the truth. [613]

You must use your common sense, as men and women possessing some knowledge of the ways of the world, and, if, after examining carefully all the facts and the circumstances established by the evidence in this case, you can feel and say that you have a settled and abiding conviction of the guilt of the defendants, then you are satisfied beyond a reasonable doubt. If you have not such a conviction, then you should acquit the defendants.

A reasonable doubt may not be based upon a mere whim, sympathy, suspicion, or some vague possibility.

On the other hand, proof beyond a reasonable doubt does not mean that the evidence should establish the guilt of a defendant beyond all possible doubt. The law does not require absolute certainty of guilt before there can be a verdict of guilty at your hands.

Now, what kind of evidence do we have? First, there are two general types. One is direct or positive. The other is circumstantial.

Direct and positive testimony generally is that which a person sees, hears, smells, observes by virtue of the use of the senses.

Circumstantial evidence is proof of facts and circumstances concerning the transactions or the conduct of the parties which conclude or lead to certain [614] inevitable conclusions.

Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case. However, the circumstances must be consistent with each other, consistent with the guilt of the parties charged, inconsistent with their innocence, and inconsistent with every other reasonable supposition or hypothesis except that of guilt, and when circumstantial evidence is of such a character, circumstantial evidence alone, without any direct testimony at all, is sufficient to convict and you will review all the circumstances established by the evidence in the light of this instruction or the instruction I have just given you relative to circumstantial evidence.

In the course of these instructions I use and have used the words "inference" and "presumption."

An inference as we use it in these instructions means a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption, such as a presumption of inno-

cence, is an inference which the law requires the jury to make from particular facts in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence [615] to the contrary, but unless so outweighed, the jury is bound to find in accordance with the presumption.

Coming now to the charge in this case against the defendants, the indictment returned against them read as follows: You will get it and take it with you to the jury room, where you may study it, and I will give it to you in full because it is rather short, and, I believe, understandable. The indictment is contained in one count, and is as follows:

That on or about April 13, 1955, Cedric Theodore Berg and Victoria Ruth Foughty Heller did knowingly, willfully and unlawfully persuade, induce and entice Rose Drucilla West, a female person, to go from San Francisco, California, to the Northern Division of the Western District of Washington, with the intent that the said Rose Drucilla West should engage in the practice of prostitution, debauchery, and for other immoral purposes, and did thereby knowingly cause the said Rose Drucilla West to go and be transported as a passenger upon the line and route of a common carrier in interstate commerce.

All in violation of Section 2422, Title 18, U.S.C.

I might state here at this point that the Northern Division [616] of the Western District of Washington is the area wherein Seattle is, and if

you believe from the evidence that the witness or the person, Rose West, came to an airport or came to the City of Seattle, she would be in the Western District of Washington, Northern Division; so that I think for the purpose of testimony here, you might consider the Northern Division, Western District of Washington, to be the same as Seattle and the vicinity of Seattle.

Now, the indictment returned by the Grand Jury in this case charges a violation of what is known as the White Slave Traffic Act and insofar as the Act is pertinent here, it provides that:

“Whoever knowingly persuades, induces or entices . . . any woman or girl to go from one place to another in interstate or foreign commerce . . . with the intent or purpose that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice . . . and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier in interstate commerce . . .” shall be punished.

That is the indictment and that is the law under which it is returned. [617]

So that you may better understand the nature of the charge, I will advise you now as to the essential elements of the offense charged.

Before you can find either of the defendants guilty of the offense charged in the indictment, you must find that the following essential elements of the offense charged are established as to such de-

fendant, which means each defendant, from the evidence beyond a reasonable doubt:

These are the four elements:

First, that Rose West, a woman, was persuaded, induced or enticed by such defendants—that would be either—you must consider each one separately—to go from San Francisco, California, to the Northern Division of the Western District of Washington; or, in other words, to Seattle.

Second, that such defendant knowingly persuaded, induced or enticed Rose West so to do.

Third, that such defendant so persuaded, induced or enticed said Rose West with the intent that she, Rose West, should engage in the practice of prostitution.

Fourth, that because of such persuasion, inducement or enticement such defendant knowingly caused Rose West to be transported as a passenger upon the line [618] of a common carrier in interstate commerce.

A common carrier may be defined as one who holds himself or itself out to the public as engaged in the business of transporting persons or property from place to place for compensation.

The word “knowingly” as used in the instructions and in the law means this—that an act is done voluntarily and purposefully, and not because of mistake or some inadvertence or some other innocent reason.

As I indicated before, you must consider each defendant separately, and in doing so you must

consider the evidence separately as to each defendant.

Certain evidence was introduced, as you recall, and on certain occasions the Court indicated that it could be considered only with respect to one or the other of the defendants. Bear that in mind. If as to one defendant you find that all the elements which I have enumerated have been established beyond a reasonable doubt, you should find that defendant guilty. On the other hand, if you have any reasonable doubt as to one of the essential elements, you should acquit the particular defendant concerned.

The law under which this indictment has been returned is a Congressional exercise of rightful power forbidding the use of interstate transportation and commerce [619] as an agency to promote immorality such as prostitution and debauchery. We are not here primarily concerned with the morals of the defendants or with the character of Rose West. It makes no difference so far as the offense here charged is concerned whether Rose West was a depraved or an innocent woman. The United States is concerned only with the question of whether she was induced, and thereby caused, to be transported by a common carrier in interstate commerce from San Francisco, California, to the Western District of Washington for the purpose of prostitution.

The law is directed against the use of interstate transportation or commerce for immoral purposes or in promoting or carrying out such practices.

It seems undisputed from the evidence that Rose West, prior to the time here involved, had engaged in prostitution. Therefore, there is no wounded innocence or corrupted virtue involved. However, the law is violated whether it be innocence or depravity that was induced and thereby caused to be transported in interstate commerce by common carrier from one state to another with the intention and purpose of promoting prostitution.

You are instructed that the government need not prove that acts of prostitution actually occurred under the charge of this indictment but it is sufficient for the [620] government to prove that a defendant intended that Rose West, a woman, should engage in prostitution when she reached the Western District of Washington, and whether Rose West did so actually engage need not be established by the government in order to sustain the charge set forth in the indictment.

Evidence has been admitted in this case with respect to whether Rose West engaged in prostitution at the home occupied by Mrs. Heller. Also, there has been evidence admitted with respect to certain alleged activities of Mrs. Heller and defendant Berg which might tend to indicate that acts of prostitution on the part of Rose West and other persons were encouraged and promoted. This evidence is admitted solely for the purpose of establishing, if you so find, the intent of the defendants, Mrs. Heller and the defendant Berg, when they induced or persuaded and knowingly caused Rose West to come from San Francisco to Seattle, if

you find from the evidence that they did so persuade and knowingly cause Rose West to come. Therefore, if you should find from the evidence that Rose West engaged or committed acts of prostitution while in Seattle, or that the defendants engaged in immoral practices in violation of state or city law, such fact would be immaterial to the case, for you should not concern yourself with whether or not the defendants or [621] any witness should be punished for violating the state or city law. That is a matter solely for the state or city authorities and a matter over which this Court has no control or jurisdiction.

Now, in every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

A person is held to intend all the natural and probable consequences of acts knowingly done. That is to say, the law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done. Intent may be inferred from all the evidence in the case, including any acts done or statements made by the accused. The jury should consider all the facts and circumstances in evidence which may aid determination of the issue as to intent, and, of course, in this case intent is a very basic element and a very important one.

Intent may be proved by circumstantial evidence, and actually it rarely can be proved by any other

means because while we know what witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye witness [622] account of the state of mind with which the acts were done or omitted. But, what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is not necessary for the government to prove that the sole and single purpose of transportation of Rose West in interstate commerce was prostitution. It is enough that one of the dominant purposes in the minds of the defendants was that she should so engage.

Again, I caution you that you must consider the evidence as to each defendant separately.

You are instructed that the necessary intent, purpose and motive on the part of each of those accused in a prosecution for alleged violations of the White Slave Traffic Act may be proved by circumstantial evidence. I have commented on that before and the conduct of the parties, a reasonable time before and after the transportation alleged, may be taken into consideration by you in the determination of the intent of the defendants.

You are instructed that any statements made by a party defendant, not in the presence of a co-defendant, may be considered by you solely as against the party making the statement. However, statements of a party defendant which were made within the presence of a co-defendant may be considered by you as against both. [623]

As to the issue of credibility—who are you going to believe—that in this case as in most cases is very important.

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies and by the character of the testimony given or by contradictory evidence.

You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief; and consider each witness's intelligence, motive and state of mind, his or her demeanor and manner while on the stand; and, consider also any relation each witness may bear to either side of the case, and the manner in which each witness might be affected by the verdict, and the extent, if at all, to which each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony.

Two or more persons witnessing an incident or [624] a transaction, or hearing a conversation, may see or hear it differently, and an innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, consider

whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

It is your duty, and I am confident you are well aware of it under your oath, consciously, seriously and free from prejudice or sympathy, to return a true verdict under the evidence and these instructions. It is not the policy of the law that a verdict of guilty should be returned against any one on trial unless such verdict is supported by the evidence beyond a reasonable doubt; but, it is likewise against public policy that any person who has violated a law should escape if the testimony shows such person is guilty beyond a reasonable doubt.

It is your duty as jurors to confer with each other freely and frankly about the issues involved in this case and the testimony and the evidence and the many questions [625] that present themselves to you for the purpose of agreeing, if you can honestly do so, upon a common verdict. In the end, your verdict must be that of all twelve of you and a verdict representing an opinion of any lesser number is not a lawful verdict.

The law of the case is for the judge and I have sought to give it to you in these instructions, and it is your duty to accept the law as I have stated it. Likewise, you are bound to accept rulings that the Court has made throughout the trial of the case

as to the evidence. When objections are overruled or sustained, it doesn't mean, and you should not take any ruling of the Court to indicate, what the Court believes as to that evidence, whether admitted or excluded. As to the facts in the case, what the evidence proves, what weight to give to the testimony of the various witnesses, and particularly what inferences should be drawn from the facts and circumstances proved, that is exclusively your function. With respect to that you are to be controlled by neither any opinion that the Court may see fit to express nor by the arguments of counsel, although you have listened with respect, and are entitled to any aid counsel may give you in summarizing and recalling and explaining the facts.

As to what the facts prove, should you have [626] an opinion that the Court, because of any ruling or because of any comment made or because of anything stated in these instructions, has expressed an opinion as to the guilt or innocence of the defendants or as to the credibility or weight of the testimony of any witness, I want to advise you that you should not be controlled or influenced in any respect by the Court's ruling when you are considering what the facts are. The Court's rulings are binding so far as you are concerned as to the law. So, again, what the facts are, what you find them to be, that is your responsibility.

Should it become necessary during your deliberations to communicate with the Court, you may do so by sending a note through the bailiff. I assume that will not be necessary in this case. Should it

happen, be cautious you do not reveal at any time how the jury stands numerically or otherwise with respect to the guilt or innocence of either defendant.

You know from your former experience that you select one of your group as foreman or forelady, and then proceed with your deliberation, giving everyone an opportunity to express his views.

The form of verdict has been prepared for you and it is typed out, and it reads:

We, the jury in the above-entitled case, [627] find the defendant Cedric Theodore Berg, and then there is a blank, and if you find him guilty, put in there the word "is," and if not, put in "not," and the same as to the defendant Victoria Ruth Foughty Heller.

It should be signed by your foreman, and should be dated. I assume that the date will be today.

The exhibits will go with you to the jury room along with the indictment and the form of verdict.

Do counsel anticipate any suggestions or exceptions with respect to the instructions?

Mr. Rousso: Yes, your Honor.

Mr. Guterson: I have none.

The Court: All right. The jury will go to the jury room.

Do not begin your deliberations until you have been further advised. If the Bailiff brings up the form of verdict, the Indictment, and the exhibits to you and gives them to you, that will indicate you may proceed with the deliberations. Do not do it before that. It may be that the Court will have occasion to call you back and give you some addi-

tional instructions or modified instructions already given to you. You may now be excused.

(Whereupon, the jury retired from the court room.) [628]

The Court: You have no suggestions?

Mr. Guterson: No, your Honor.

Mr. Rousso: If the Court please?

The Court: Yes?

Mr. Rousso: On behalf of the Defendant Cedric Theodore Berg at this time I want to take exception to the instruction given by the Court in regard to the elements which he identified as element number four of the offense, reading as follows:

The Court: I have that, if you want it. Do you have it accurately?

Mr. Rousso: If I may have it, sir.

The Court: I added a word or two here and there but didn't change the sense.

Mr. Rousso: Defendant Berg excepts to element four, to wit:

"That because of such persuasion, inducement or enticement such defendant knowingly caused Rose West to be transported as a passenger upon the line of a common carrier in interstate commerce."

We do not feel that that instruction is consistent with the law under the circumstances; that the instruction given in its context is prejudicial [629] to the Defendant Berg.

The Court: How would you suggest——

Mr. Rousso (Interposing): Our suggested instruction would read as follows:

"That said Defendant knowingly caused Rose

West to be transported as a passenger upon the line of a common carrier in interstate commerce.”

Striking out:

“. . . because of such persuasion, inducement or enticement. . . .”

The Court: The other three elements you do not take exception to?

Mr. Rousso: I don't believe so, no.

Mr. Volinn: I would take further exception to the instruction generally along the lines I have previously mentioned as being based upon evidence which is non-existent, to-wit:

There is no evidence in this case, as we see it, of a common carrier and, therefore, the entire instruction is not warranted.

The Court: That the case should not have gone to the jury?

Mr. Volinn: Yes. I should like to see the instruction which deals with the law—relating to the purpose of the law. There was one instruction [630] wherein it was stated that the purpose of the law is to prevent——

The Court: You mean the comment?

Mr. Volinn: Yes. The enactment.

The Court: “The law under which this Indictment has been returned is a Congressional exercise of rightful power forbidding the use of interstate transportation and commerce as an agency to promote immorality such as prostitution and debauchery.”

Mr. Volinn: I think that might be prejudicial, your Honor.

The Court: Do you want to except to it?

Mr. Volinn: Yes, I except to it on behalf of the Defendant Berg.

Mr. Kosher: Your Honor, on behalf of the Defendant Heller may I take exception to the same instructions and adopt the same grounds?

Mr. Volinn: It seems to me it is a comment.

The Court: No question about it being a comment.

Mr. Rousso: I think that is all from our point of view, your Honor.

The Court: All right; then I think we [631] will let it go. I do not believe it is erroneous. I will say this, gentlemen, I think there is a question on that on an exception. There is some reason to believe that from those cases in the Seventh Circuit that, if followed, they might conceivably hold that it would be necessary to establish some cause apart from inducement. However, as I read the statute, I can not come to any conclusion other than that the cause must result from the inducement. I have been unable to find a case which actually covers the point.

Mr. Rousso: Well, the only reason we feel the way we do is because of the word "thereby", which is the premise of the Court's thinking. The word "thereby" appears in the old statute as well as in the new statute.

The Court: Well, sometimes even the Court of Appeals is wrong, so I won't change my instructions.

Do you have any objection to a procedure of let-

ting the jury now take the exhibits and starting in without calling them back?

Mr. Volinn: No, your Honor.

Mr. Kosher: None at all. We have no objection.

* * * * *

The Court: If you think you are making progress, I will have nothing further. If you think you are having difficulty, why, I have some thoughts to suggest to you; but if you are making progress I would rather you go ahead with the idea of reaching agreement.

I wish to make this observation. Do you think now you are making some progress and are going to reach a verdict one way or the other?

I am not asking you how you are going to reach it. There may be some doubt in your mind. I will give you these thoughts that you may wish to consider in [637] your deliberations along with the evidence and the instructions I have previously given you.

This case is an important one, and if you should fail to agree on a verdict the case is left open and undecided, and, like all cases, it must be disposed of some time, and there doesn't seem to be any reason to believe that the case can be tried any better or more exhaustively than it has been by either side. Any future jury that must be selected to try this case will be selected in the same manner and from the same source as you have been chosen, and there appears to be no reason to believe that the case would be ever submitted to twelve men and women who are any better qualified or more intel-

ligent or more impartial or more competent to decide it, or that more or any clearer evidence could be produced on behalf of either side.

Now, these matters, of course, suggest themselves upon reflection, a brief reflection, to all of us who have participated or sat through this entire trial. Now I mention this so that you will bear that in mind in reviewing the evidence. Now I don't indicate to you that you should—how you should determine the case at all. I remind you it is important that you reach a verdict of guilty or not guilty if you can do so without violence to your individual judgment and conscience. [638]

The Court doesn't wish you or any juror to surrender his or her own conscientious convictions as to guilt or innocence, nor to surrender your convictions as to the weight or effect of any of the evidence solely because of the opinion of some other juror or for the mere purpose of reaching a verdict.

However, it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can without violence to your own individual judgment. You each must decide the case for yourself from the evidence and following the instructions of the Court. Of course, you, in the course of your deliberations, should not hesitate to change your opinion if you become convinced that it is erroneous. Bear in mind that for twelve minds to reach a unanimous result you must examine the question submitted to you with frankness and candor and with proper deference in regard to the opinions of each other. That is to say,

in conferring together you should be able to do it respecting the views of the others and listen to the views of one another with a disposition to re-examining your own.

If a much greater number of you are for conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, if it makes no effective impression upon the minds of any other [639] equally honest, equally intelligent fellow jurors who bear the same responsibility and serve under the same sanction and the same oath and have heard the same evidence and given it the same attention and who undoubtedly have the same and an equal desire to arrive at the truth. On the other hand, if a larger or even a lesser number of you are for acquittal, other jurors ought to seriously ask themselves again whether or not they have or do not have reason to doubt the correctness of a judgment not concurred in by a number of your fellow jurors and where there is sufficient evidence which fails to convince the minds of their fellow jurors to a moral certainty and beyond a reasonable doubt.

As I have stated in the course of my instructions following the argument, you are not partisans. You are judges of the facts in this case. Your sole purpose is to ascertain the truth from the evidence before you, and, as I stated and repeat again, you are the sole and exclusive judges of the credibility of all the witnesses, the sole and exclusive judges of the weight and effect of the evidence. In this high duty and performance of it you are at liberty

to disregard all the comments or *opinion* the court and counsel and you, of course, are at liberty to disregard the remarks I am now making to you. Remember that at all times, or at no time, I should say, [640] is a juror expected to yield a conscientious conviction that he or she may have as to the weight or effect of the evidence, bearing in mind, also, that after full deliberation and consideration of all the evidence it is your duty to agree upon a verdict, if you can do so without violating your own judgment and conscience.

So I suggest that you conduct your deliberations when you go back as you choose, but carefully re-examine and reconsider all the evidence bearing on the questions before you, and do your utmost to reach a verdict in accordance with the instruction I have given you.

Now, you may retire and continue your deliberations in such manner as you shall determine, using your good conscience and judgment as reasonable men and women.

I hope you will be able to make some progress.

(Whereupon, the jury retired from the court room.) [641]

* * * * *

[Endorsed]: Filed January 17, 1956.

[Endorsed]: No. 15000. United States Court of Appeals for the Ninth Circuit. Cedric Theodore Berg and Victoria Ruth Foughty Heller, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: January 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth District

No. 15000

VICTORIA RUTH FOUGHTY HELLER,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT WILL RELY

The appellant, Victoria Ruth Foughty Heller, will rely on the following points in this proceeding:

1. The District Court erred in denying the Motion of defendant, Victoria Foughty Heller, for acquittal.

(a) That the evidence was insufficient to take the case to the jury.

(b) That there was no evidence that the alleged victim was transported by a common carrier.

2. The Court erred in advising the jury that the purpose of the Mann Act was to prevent immorality.

3. The Court erred in finding that the Indictment was not erroneous in failing to allege the place where the alleged crime was supposed to have been committed.

/s/ MAX KOSHER,

Attorney for Appellant, Victoria Ruth Foughty
Heller.

[Endorsed]: Filed January 24, 1956. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL AND
DESIGNATION OF RECORD ON APPEAL

Comes now appellant above named and advises the Court that on his appeal he intends to rely upon each and all of the following points, to wit:

1. Insufficiency of the evidence to establish the charge or to support the verdict and/or judgment on the charge contained in the indictment.

2. That the District Court and the Judge thereof erred in denying appellant's motion made at the conclusion of all the evidence in the case for a judgment of acquittal.

3. That the verdict is contrary to the weight of the evidence.

4. That the verdict is not supported by substantial evidence.

Appellant Berg hereby designates the entire record, including all minute orders and the exhibits introduced in the trial in the above entitled cause, as the contents of his record on appeal.

Dated: May 21, 1956.

/s/ CEDRIC THEODORE BERG,
In Propria Persona.

[Endorsed]: Filed May 23, 1956. Paul P. O'Brien,
Clerk.

No. 15000

United States Court of Appeals
For the Ninth Circuit

VICTORIA RUTH FOUGHTY HELLER, *Appellant*,
v.
UNITED STATES OF AMERICA, *Appellee*.

Appeal from Judgment and Sentence in the United
State District Court for the Western District
of Washington, Northern Division

BRIEF OF APPELLANT

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FILED
OCT 19 1956

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United States Court of Appeals

For the Ninth Circuit

VITORIA RUTH FOUGHTY HELLER,	}	No. 15000
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	<i>Appellee,</i>	

Appeal from Judgment and Sentence in the United
State District Court for the Western District
of Washington, Northern Division

BRIEF OF APPELLANT

JURISDICTION

This is an appeal from a verdict and judgment of conviction upon an Indictment charging appellant Victoria Ruth Foughty Heller and her co-defendant, Cedric Theodore Berg, with violation of Title 18 U.S.C. Section 2422, the persuasion section of the White Slave Traffic Act. Both defendants were found guilty by verdict of a jury. (R. 4)

Appellant Heller, on October 3, 1955, filed a Motion for Acquittal Notwithstanding the Verdict, or in the Alternative a Motion for New Trial (R. 5)

On November 1, 1956, Judgment was entered against appellant Heller sentencing her to two years imprisonment (R. 9). On the same date, judgment was entered against her co-defendant Berg (R. 7).

Two days later, on November 3, 1955, an Order was entered denying appellant Heller's Motion for Acquittal and for a New Trial (R. 11).

Both defendants have appealed.

Notice of Appeal on behalf of appellant Heller was filed November 3, 1955. (R. 12-13). On November 28, 1955, the District Judge entered an Order extending the time for filing the transcript of record until January 31, 1956 (R. 18). The reporter's transcript of record was received by the Clerk of this Court on January 19, 1956 (R. 362). The printed record was received by appellant Heller on the 24th day of September, 1956.

STATUTES INVOLVED

The White Slave Act, as last amended, and insofar as the same is involved in this action, is set forth as Section 2422, Title No. 18, U.S.C., and reads as follows:

§ 2422—Coercion or enticement of female:

“Whoever knowingly persuades, induces, entices or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other im-

moral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than \$5,000.00 or imprisoned not more than five years, or both." (June 25, 1948 c. 645, 62 Stat. 812)

Reviser's Note: Based on Title 18 U.S.C. 1940 Ed. Sec. 399 (June 25, 1910, Ch. 395, Sec. 3, 36 Stat. 825)

THE INDICTMENT

The indictment in this case, containing one count, was returned in the Western District of Washington, Northern Division, and reads as follows:

Count I

That on or about April 13, 1955, Cedric Theodore Berg and Victoria Ruth Foughty Heller did knowingly, wilfully and unlawfully persuade, induce and entice Rose Drucilla West, a female person, to go from San Francisco, California, to the Northern Division of the Western District of Washington, with the intent that said Rose Drucilla West should engage in the practice of prostitution, debauchery, and for other immoral purposes, and did thereby knowingly cause the said Rose Drucilla West to go and be transported

as a passenger upon the line and route of a common carrier in interstate commerce.

All in violation of Section 2422, Title 18 U.S.C. A True Bill." (R. 3, 4)

STATEMENT

The Relationship of Defendants:

The appellant, Victoria Ruth Foughty Heller, is a 31 year old woman, and the mother of two children. She has been twice married and twice divorced, each union bearing one child. Both children lived with their mother at her home in Seattle, Washington (R. 246-248).

Mrs. Heller became engaged to be married to Robert McSharry, a seaman employed as quartermaster on the M.S.T.S. vessel "General John Polk" (R. 152). As part of their marriage plans they purchased a house in Seattle, Washington. This house, purchased in McSharry's name, was occupied by Mrs. Heller and her children pending her marriage (R. 248).

Cedric Theodore Berg, Mrs. Heller's co-defendant, was also a seaman employed on the M.S.T.S. vessel "General Polk" (R. 152), and became acquainted with Mrs. Heller in January, 1956, through his shipmate, Robert McSharry. Mrs. Heller and Mr. Berg became good friends, but there was no romantic attachment between them. Mrs. Heller and her fiancée, McSharry, saw Mr. Berg from time to time between January and April 1955 (R. 249). During this period Mr. Berg often told Mrs. Heller that he was in love with

Mrs. Rose West of Los Banos, California, and that he wanted her to come to Seattle to marry him (R. 251, 305).

The Trips to California:

Mr. Berg met Rose West in 1947 at Firebaugh, California, where she was practicing prostitution, and had been associating with her since that time. Mrs. West stopped the practice of prostitution during the year 1951 or 1952, and Mr. Berg discussed marriage with her during the latter year (R. 301).¹

In August, 1954, Mr. Berg went to Los Banos, California. While there he saw the witness, Rose West (R. 24, 302). During this visit, Mr. Berg and Rose West again discussed marriage and the possibility of making a home in Seattle (R. 302).² Mr. Berg denies that he at that time suggested that Rose West come to Seattle to practice prostitution, or that Mrs. West offered to do so (R. 302).

¹The Witness West denies ever discussing marriage with Berg, but admits they were good friends and were intimate a number of time in California (R. 69).

²Mrs. West corroborates this visit, but states that Berg told her that if she wanted to come to Seattle and "work", that he would call her when his ship came in (R. 26-27).

In March, 1955, Mr. Berg again went to Los Banos, California, for the dual purpose of visiting his mother and seeing Rose West (R. 304). During this visit, Mr. Berg and Mrs. Rose West again discussed marriage and that in the presence of others, she stated she was planning to come to Seattle and marry Mr. Berg (R. 305).¹

Mr. Berg returned to Seattle about March 28 or 29, 1955 (R. 306). Because he was then unemployed and short of money, Mrs. Heller allowed him to move into her home on April 1, 1955 (R. 252). This is corroborated by the testimony of defendant, Berg (R. 306).²

The Telephone Conversations:

(a) *The First Call*: Rose West testified that following Mr. Berg's return to Seattle, her next contact with him was by telephone on Sunday, April 3, 1955 (R. 31). This call apparently originated from the Heller residence as shown by a telephone call toll ticket (Exhibit No. 5) (R. 141). This exhibit was admitted over objection of defense counsel. (R. 139) During this conversation, Rose West stated that she spoke to Mr. Berg and to a woman (R. 30, 31) whom

¹Mrs. West denies that marriage was ever discussed (R. 63); states her conversation with Mr. Berg concerned prostitution, and that she told Berg at that time that she would come to Seattle (R. 29).

²The April 1st date was originally fixed by Berg as March 1, 1955 (R. 306), but was subsequently revised to April 1, 1955 (R. 307)

she identified later as Mrs. Heller (R. 102). During this telephone call, Mrs. West stated that she was told by the defendant, Berg, to "come on up, everything was O.K., and she had nothing to worry about" (R. 32).¹ On re-direct examination, this conversation was amplified by the witness to include a statement by Mrs. Heller that she should "come and give it a try" (R. 105).

Mr. Berg admits making this call, but states that the purpose was to advise Mrs. West that he was looking for a place to live as he had promised her he would do as soon as he got back to Seattle (R. 308). Mr. Berg further catagorically denies that in this conversation, or in any conversations with Mrs. West, any mention of prostitution was made or implied (R. 308).

(b) *The Second Call*: Mrs. West testified that "a couple of days later" she received another call from Mr. Berg (R. 32). Mrs. West testified that he inquired as to why she hadn't come up. She said she didn't have the money, and was told he would send it (R. 33). Again, on re-direct examination, the witness amplified this call to include a conversation with Mrs. Heller wherein she was asked again why she didn't come up (R. 104).

¹ It is to be noted that the trial court repeatedly instructed the jury that these conversations related by Mrs. West with Mr. Berg were not to be considered in connection with the charge against Mrs. Heller (R. 24, 28, 31-32, 38).

On April 7, 1955, Mrs. West received \$60.00 from Mr. Berg (R. 33). No part of this money was contributed by Mrs. Heller (R. 254, 309)¹ nor did Mrs. Heller know at that time that any money had been sent (R. 254-255).

Evidence of a third telephone call was received (R. 33) under instructions by the Court that it did not apply to Mrs. Heller (R. 31-32, 147).

The Trip to Seattle:

On April 12, 1955, Rose West was driven by friends from her Los Banos home to the San Francisco Airport (R. 35). She testified that prior to leaving her home, she had called the airport to see if she could get on the plane (R. 36). Upon her arrival at the airport, she "went to the Western Airlines there and gave my name and got my ticket" (R. 37).

Witness West's plane arrived at the Seattle airport between 5:30 and 6:00 A.M. the next day (R. 37).

Upon her arrival, she took a taxicab to the Heller residence (R. 37, 38).

Events in Seattle:

Mrs. West remained at the Heller home for less than four days. During this period of time, no acts of prostitution were committed (R. 260, 311, 312) nor

¹ Exhibits Nos. 1, 2, 3 and 4 evidencing the sending of this money were admitted only as to defendant Berg, and the jury instructed not to consider them in connection with Mrs. Heller (R. 137).

was there any discussion relative to that subject (R. 254).¹

Mrs. West left the Heller home Saturday morning, April 16, 1955 (R. 47) due to an altercation with the defendants over the theft of money by the witness (R. 318, 319).²

From the Heller home, Mrs. West went next door, borrowed \$20.00 from the neighbor (R. 192) and was taken to a downtown hotel (R. 194), and subsequently was interviewed by detectives (R. 48).

SPECIFICATIONS OF ERROR TO BE URGED

1. The District Court erred in denying the Motion of Appellant, Victoria Ruth Foughty Heller, for acquittal, in that:

(a) The evidence was insufficient to take the case to the jury.

(b) There was no evidence that the alleged victim, Rose Drucilla West, was carried or trans-

¹This is disputed by Mrs. West who states that she discussed prostitution with Mrs. Heller the day of her arrival (R. 42, 43) and that three acts of intercourse were committed during her stay (R. 43, 45). Mrs. West further testified that Mrs. Heller received part of the money from these acts (R. 46). This is denied by Mrs. Heller (R. 268).

²Mrs. West denies the theft (R. 71), but testimony by government witness, Busby, corroborates defendants' testimony (R. 189).

ported as a passenger upon a common carrier in interstate commerce.

2. The District Court erred in advising the jury that the purpose of the Mann Act (18 U.S.C. 2422) was to prevent immortality and debauchery.

SUMMARY OF ARGUMENT

I.

Even a cursory examination of the Record in this cause establishes that whatever case may have been made out against the appellant, Victoria Ruth Foughy Heller, it was predicated solely upon the testimony of the alleged victim, Rose Drucilla West Dill.¹

From the testimony of Mrs. West herself, it is apparent that an agreement to come to Seattle from California had been formulated between appellant Heller's co-defendant, Berg, and Mrs. West prior to the date when Mrs. West first knew or even talked to Mrs. Heller.

It is appellant Heller's position that in view of this fact, she did not "*persuade*", "*induce*", nor "*entice*" the victim from California to Seattle, Washington—nor by persuasion, inducement or enticement did appellant "*cause*" the alleged victim to move in interstate commerce.

¹ Mrs. West testified that she had been married in the interim between the finding and return of the Indictment and the date of trial. Hence, she is referred to in the proceedings, and in this Brief, by her surname "West" as is charged in the Indictment.

The terms "persuade", "induce" and "entice", as used in the White Slave Trade Act (*supra*) have inherent in them the meaning that, because of such persuasion, inducement or enticement, the victim is "caused" to move in interstate traffic. Stated differently, to be guilty under the cited statute, the defendant's inducements must have been the moving cause in bringing about the prohibited traffic.

By ways of analogy, let us pose a situation: It has already been determined that mere ownership or operation of a house of prostitution to which women come in interstate commerce is insufficient to sustain a charge under this act. (*McGuire v. United States*, 152 Fed. (2nd) 577) Now, suppose the case of the owner of a house of prostitution in Seattle, who, while returning to Seattle from California, meets a prostitute on her way to that city to ply her trade. Suppose, further, that while the train was passing through Oregon, he offered her a job at his brothel. Can it be said his offer constituted the inducement which caused her trip to the City of Seattle for the prohibited purposes? We think not. At the time of his contact with this prostitute, she had already formed the intent to come for that purpose, and his offer in no wise caused the continuation of her travel nor altered her course of conduct.

In the instant case, even adopting the government's facts, the relationship of Mrs. West to Mrs. Heller is no stronger. Even by Mrs. West's own testi-

mony, at the time of her original meeting with this appellant, she had already agreed with Mr. Berg to come to Seattle for prostitution. Therefore, even if as Mrs. West states, Mrs. Heller offered her a place to work, such offer was not the efficient moving cause of the prohibited travel.

II.

The evidence of the government failed to establish that Mrs. West travelled by Common Carrier from California to Seattle. The testimony of Mrs. West in this regard (R. 26, 37), as set forth in detail subsequently in this Brief, is merely to the effect that the alleged victim purchased a ticket from San Francisco to Seattle from Western Airlines, and that she subsequently arrived at the Seattle airport. There is no evidence that Mrs. West ever boarded a Western Airline plane, nor does the record indicate in any fashion whether the plane which transported Mrs. West was an aircraft carrying other passengers; whether it was a special or chartered flight; whether it was a private or commercial craft, or any factor upon which its status as a common carrier could be determined by other than supposition and speculation.

III.

Appellant further contends that if evidence, admissible only against the co-defendant Berg, be stricken from consideration in determining the guilt or innocence of Mrs. Heller, the Record taken as a whole

fails to disclose evidence sufficient to warrant the verdict against this appellant.

IV.

At the close of the trial, the Court, in its instructions, stated to the jury that the purpose of the law was to prevent immorality and debauchery. Exception is taken to this instruction. This gratuitous comment by the Court could serve no useful purpose in assisting the jury in its deliberations, and when read in context, most probably was construed by the jury as indicating that enforcement of the White Slave Trade Act as against appellant and her co-defendant was particularly appropriate.

ARGUMENT

I.

ONE CANNOT BE INDUCED, PERSUADED OR ENTICED TO DO THAT WHICH HE INTENDS:

The defendants are charged jointly with violation of the persuasion section of the White Slave Traffic Act (18 U.S.C. 2422) by an indictment charging that they:

“did knowingly, wilfully and unlawfully persuade, induce and entice one Rose Drucilla West, a female person, to go from San Francisco, California to the Northern Division of the Western District of Washington, with the intent that said Rose Drucilla West should engage in the practice of prostitution, debauchery, and for other im-

moral purposes, and did thereby knowingly cause the said Rose Drucilla West to go and be transported as a passenger upon the line and route of a common carrier in interstate commerce (R-3).

Both defendants being charged as principals, with no allegations of conspiracy, the acts of one defendant are not chargeable to the other.

The Indictment (R. 4) is framed substantially in the language of the statute, which provides as follows: § 22422—Coercion or enticement of female:

“Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia, or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia, or in any Territory or Possession of the United States, shall be fined not more than \$5,000.00 or imprisoned for not more than five years, or both.” June 25, 1948, c 645, 62 Stat. 812.

From a reading of the foregoing section, it is obvious that the intent of the law is to punish those who, by persuasion, inducement, enticement or coercion, are successful in causing the interstate or foreign movement of females for immoral purposes. It is equally apparent from the statute that the law is not formulated to penalize persons whose acts or conduct is unsuccessful in that purpose or who, by such acts or conduct, are not the efficient moving cause in such traffic. (*McGuire v. United States.*) (*supra*).

It is therefore necessary to a consideration of the evidence against either or both of the defendants to analyze the meaning of the words "persuade", "induce" and "entice" as they are used in the White Slave act. (*Supra*).

In construing the meaning of Statutes, it is well settled that, unless a contrary intent appears from the act itself, the words and phrases of the statute are to be taken in their ordinary acceptation and popular meaning (50 *Am. Jur. Statutes*, Sec. 414, p. 438). This rule has been many times affirmed by the Supreme Court of the United States:

"In the absence of a definition of a statutory word by the legislature, the etymology of the word must be considered and its ordinary meaning applied." *United States v. Lombardo*, 241 U. S. 73; 36 S. Ct. 508; 60 L. ed. 897.

Accord: *Old Colony T. Co. v. Commissioner of Internal Revenue*, 301 U. S. 379; 57 S. Ct. 813;

81 L. ed. 1169: *Roseman v. United States*, 323 U. S. 658; 65 S. Ct. 536; 89 L. ed. 535.

Furthermore, as was stated in 62 *Cases of Jam v. United States*, 340 U. S. 595; 71 S. Ct. 515; 95 L. ed. 566:

“In its anxiety to effectuate a congressional purpose of protecting the public, a court must take care not to extend the scope of a statute beyond the point where congress intended it to stop.”

The words “persuade” “induce” and “entice” are common English words having well established meanings which do not permit of a strained or technical interpretation.

PERSUADE: “To induce (one) by argument, entreaty, or expostulation into a determination, decision, conclusion, belief or the like.”

Synonym: “See induce.”

INDUCE: “To move by persuasion . . . Induce and persuade, agree in the idea of moving or influencing a course of action.”

Synonym: “Entice”

ENTICE: “To draw on by exciting hope or desire . . . often, in a bad sense, to lead astray, to induce to evil . . .”

Synonym: “Persuade, inveigle.”

WEBSTER'S NEW INTERNATIONAL DICTIONARY, SECOND EDITION.

Webster's definitions were adopted in |interpret-

ing the White Slave Traffic Act (*Supra*) in *La Page v. United States*, 146 Fed. (2nd) 536, and the terms "inducing" and "persuading" were held synonymous in *People v. De Joy*, 198 Ill. App. 361, a pandering prosecution.

By definition, then, the terms "persuade", "induce" and "entice" require that the persuasion, inducement or enticement be the moving cause of the act.

"To inveigle or persuade or entice necessarily implies that the person is persuaded or enticed and yields assent as a result of the persuading or enticing". *Ancarola v. United States*, 1 Fed. 676.

If the persuasion section of the White Slave Traffic Act (*Supra*) is read in the light of the usual and common meaning of the words therein, and in the light of the judicial construction placed upon those words, it must be concluded that a defendant is immune for prosecution under that section unless:

1. He persuades, induces or entices a female to move in interstate traffic for immoral purposes, and
2. Such persuasion, inducement or enticement is the efficient moving cause of the prohibited traffic.

As a necessary corollary, if the intent to move in interstate commerce for immoral purposes is formulated and extant in the mind of the female at the time of the alleged persuasion, inducement, or en-

ticement, such persuasion, inducement or enticement cannot be considered the efficient, moving cause or factor in the prohibited traffic.

This reasoning has often been applied in somewhat analogous situations to protect law enforcement officials from the allegation of entrapment. Entrapment is a defense based upon the inducement or instigation of criminal acts by police (*Polski v. U. S.*, CCA Minn. 38 Fed. (2nd) 686). Thus, it has been repeatedly held that a crime was neither induced nor persuaded by law officials where the intent to commit the same originated with, or was extant in the mind of, the accused at the time the blandishments or rewards were offered. (22 *C.J.S. Criminal Law*, Sec. 45). Or, were we to paraphrase the general holdings of the court upon this subject, we might state that one cannot be entrapped, by persuasion or inducement, to perpetrate a crime which he already intended to commit.

As Applied to the Case at Bar:

The guilt of the appellant, Heller, if it be proved at all, must rest upon the insecure foundation of the testimony of the female whom, the government charges, Mrs. Heller persuaded, induced or enticed to travel in interstate commerce for immoral purposes.

If we accept the testimony of this witness at face value, we are immediately confronted with her testimony that, although she had never met Mrs. Heller

prior to a brief telephone conversation on April 3, 1955, she, the witness, had nevertheless concluded and determined during March, 1955, to come to Seattle for the purpose of prostitution. In response to questioning by the government, Mrs. West testified as follows relative to a conversation with Mr. Berg at Los Banos, California, during the month of March, 1955: (R. 25)

Q. "Did he say anything further; did you say anything about whether you would or wouldn't? (come to Seattle for prostitution) (Explanatory note added).

A. "I told him then I would come up, and he said he would let me know when he got back up here."

Again, on page 29, still on direct examination, the witness testified:

Q. (Continuing) "Was there anything further said, Miss West?"

A. "Well, when he told me about the house of prostitution he said it was O.K., nothing to worry about, everything all right, and that is all he said."

Q. "Did you agree to come up here at that time or not?"

A. "Yes, I said I would come up."

Although the omitted portion of the testimony contains references by the witness to "Vicky", (R. 29) it is to be borne in mind that, upon objection, the

trial court instructed the jury that the conversations of the witness with defendant, Berg, were not to be considered as against the appellant, Heller (R. 38)

Thus, from the testimony of Mrs. West, herself, it is clearly established that in March, 1955—a date not more than 30 days prior to meeting or conversing with Mrs. Heller—the witness had formulated and had extant in her mind the fully formulated intention to come to Seattle from Los Banos, California, for the purpose of practicing prostitution.

It is therefore respectfully submitted that no subsequent act on the part of the appellant, Heller, could have “persuaded, induced or enticed” the witness, Rose West, to do that very thing which, in March, 1955, she had already determined to do.

Indeed, if we view the record on the basis of Mrs. West’s testimony, it is obvious that an agreement was reached in March, 1955, between Mr. Berg and Mrs. West relative to the practice of prostitution in Seattle; that this agreement was further implemented by the transmittal of money to Mrs. West—a matter to which Mrs. Heller was not a party (R. 33, 254, 309)—and that their mutual intentions were consummated by the journey of Mrs. West to meet Mr. Berg in Seattle on April 13, 1955. These arrangements between Mr. Berg and Mrs. West—the solicitation of Mrs. West by personal conversation in California—the transmittal of the funds from Seattle, and finally, the trip in interstate commerce itself—evidence of themselves an agreement, so fully planned and con-

summed as to negative any inference from the record that the appellant, Mrs. Heller, was in any way instrumental as the effective moving force in "causing" the prohibited interstate traffic.

II.

THERE IS NO EVIDENCE THAT THE ALLEGED VICTIM WAS TRANSPORTED UPON A COMMON CARRIER:

During the course of the trial, the government sought to sustain the allegations of the indictment relative to transportation of Rose West "as a passenger upon the line and route of a common carrier in interstate commerce" (R. 3), by the testimony of the alleged victim. The testimony of Rose West upon this subject may be synthesized as follows (R. 36, 37):

"Q. When you left Los Banos, how did you travel to San Francisco?

A. My neighbors next door drove me to the airport."

"Q. Where did Mr. Scarpete drive you?

A. He drove me right to the airport and I got out and went in and they left.

Q. What did you next do, Mrs. West, after they left?

A. Just before I left Los Banos, I called the airport to see if I could get on the plane and when they left me off I went up to the Western

Airline there and gave my name and got my ticket.

Q. Do you remember how much it cost you for your airplane ticket?

A. Thirty Four Dollars and a little bit over.

Q. And where was it you were going: from San Francisco to where?

A. I was coming from there to the Seattle Airport."

Solely upon this testimony, and the testimony of one Tony Baffuna to the effect that a porter carried the victim's bags from the car into the San Francisco airport (R. 113), rests the entire case of the United States upon this point.

From this testimony, and this testimony alone, the government seeks to infer: (1) that Mrs. West actually travelled upon a Western Airline plane from San Francisco, California, to Seattle, Washington, and, (2) that assuming Mrs. West did board as a passenger, a plane belonging to "Western Airline", that such carrier was a common carrier, and was operating that flight as such. It is submitted that the evidence is wholly insufficient upon this issue.

It is elemental that the accused enters on the trial with the presumption of innocence in her favor. The presumption does not cease when the case is submitted to the jury, but attends the accused throughout the trial, at every stage of the proceedings, until the close thereof when the jury arrive at their verdict. (22 C.J.S. *Criminal Law Sec.* 581, p. 896, citing *U. S.*

v. Brunett, C.C.A. Mo., 53 Fed. (2nd) 219; *Powell v. State of Alabama*, 53 S. Ct. 55; 287 U. S. 45; 77 L. ed. 158)

The defendant in a criminal matter is innocent until proven guilty beyond a reasonable doubt and

“the burden was upon the Government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction.”

Furthermore:

“Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.” Citing *Vernon v. United States*, 146 Fed. 121; *United States v. Richards* (D.C.) 149 Fed. 443; *Hayes v. United States*, 169 Fed. 101; *Hart v. United States*, 84 Fed. 799.

Nor will the presumption of innocence be overcome by evidence merely of facts which are not plainly inconsistent with innocence. (*Wolf v. United States*, 239 Fed. 902). In *Kassin v. United States*, 87 Fed. (2d) 184, the court succinctly stated the rule as follows:

“In each case, however, where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences

which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence". (*Paddock v. United States* (CCA) 79 Fed. (2d) 872; *De Luca v. United States* (C.C.A.) 298 Fed. 412; *Wright v. United States* (C.C.A.) 227 Fed. 855.

In view of the presumption of innocence in favor the appellant, Mrs. Heller, it is submitted that the testimony of the witnesses, West and Baffuna, as herein set forth, is insufficient to conclude, beyond a reasonable doubt, that the alleged victim travelled by common carrier in interstate commerce.

In making a determination of this issue, it must be borne in mind (1) that it was incumbent upon the Government to prove the element of common carrier beyond a reasonable doubt (*Christoffel v. United States*, 338 U.S. 841; 69 S. Ct. 1447; 93 L. ed. 1826), (2) that there was no direct evidence that Mrs. West actually travelled upon a Western Airline plane, or, if she did, that it was a common carrier; and (3) that all these matters were susceptible of direct and positive evidence.

The evidence adduced by the Government in proof of this vital issue is, at best, both inferential and circumstantial. From the testimony that Rose West purchased a ticket, the Government seeks to infer that: (1) Rose West actually boarded a Western Airline plane and (2) travelled upon that plane, as a passen-

ger from San Francisco, California, to Seattle, Washington. From the same evidence, and the further testimony relative to her prior call to Western Airline, the Government undertakes a further, and perhaps greater, inductive leap to the conclusion that the plane upon which she travelled was a common carrier. This amounts to nothing but an effort to pile inference upon inference, and certainly does not meet the burden of proof placed upon the prosecution.

If Rose West, as a matter of fact, actually did travel by Western Airline plane from San Francisco to Seattle, a simple question propounded to her could have established that fact. If, as a matter of fact, such plane was a common carrier, airline records, certainly available to the Government, could have established that premise. But this testimony, easily procured by the Government, was never offered or adduced. On the contrary, we are left with a record which is silent upon this vital issue.

Upon the record, it is equally as consistent with the evidence that Rose West travelled upon a private plane, or upon a chartered or special flight not available to the general public.

It is a well established rule applicable to circumstantial evidence that when a relevant, competent and material fact is in possession of the prosecution and is not developed, it will not be resolved against a defendant. Rather, it is to be presumed that such evidence would be unfavorable to the Government. (22 *C.J.S. Crim. Law Sec. 594, 5995*) ; *Massey v. State*,

226 S.W. (2d) 856, 154 Tex. Cr. 263; *People v. Reed*, 40 N.Y.S. 793, 180 Misc. 289.

Redfield on Carriers and other Bailees, Sec. 19, P. 15, states as follows:

“It is generally considered that where the carrier undertakes to carry only for the particular occasion, *pro hac vice*, as it is called, he cannot be held responsible as a common carrier. So, also, if the carrier be employed in carrying for one or a definite number of persons, by way of special undertaking, he is only a private carrier. To constitute one a common carrier he must make that a regular and constant business, or at all events, he must, for the time, hold himself ready to carry for all persons, indifferently, who choose to employ him.”

Furthermore, it is settled that a common carrier may contract to render special services as a private carrier. (13 *C.J.S. Carriers*, Sec. 5; *Santa Fe P. & P. R. Co. v. Grant Bros. Constr. Co.*, 228 U. S. 177; 33 S. Ct. 474, 57 L. ed. 560; *Baltimore & Ohio S.W.R. Co. v. Voigt*, 176 U. S. 498, 20 S. Ct. 385; 44 L. ed. 560)

The matter of proof of transportation by common carrier has been several times before the courts. In *Coltabellota v. United States*, 45 Fed. (2d) 117, the defendant was convicted of two counts of violating the White Slave Traffic Act. The evidence disclosed that the bus on which the alleged victim was trans-

ported from one state to another took on passengers who had tickets; some twenty passengers made the trip at the time in question; that the bus went from one state to another, and that it had a conductor.

The Court there said:

“The statute on which the second count was based required the government to prove beyond a reasonable doubt that the bus used to transport the girl to New Jersey was a common carrier. This was a fact susceptible of definite and direct proof. Yet nothing about it was shown except that it was a bus and took passengers who had tickets; that some twenty passengers made the trip in question; that it went from Fortieth Street, Manhattan, to Bogato, N. J.; that it had a conductor. We need not go into the distinction between a common and a private carrier for there are no facts in evidence which point to this bus being one rather than the other. *All distinctive facts, supposedly so easy to have been obtained, are lacking, and there was not evidence rising above the status of mere probability that the bus was a common carrier.*” (emphasis supplied.)

It is to be noted that the facts in the *Coltabellota* decision (*supra*) are even stronger than in the instant case. In the cited decision, there was direct evidence before the Court that (1) the victim actually boarded the bus, and (2) the bus transported other passengers who had tickets. In the instant case, proof that Rose West actually boarded the Western Airline

plane is wholly inferential, and the record is entirely silent as to whether the plane carried any other passengers.

It is interesting to note from the emphasized portion of the *Coltabellota* decision (*supra*) that the court exercised the inference that facts not proved by the prosecution are presumed favorable to the defendant, and refused to resolve them against the defendant.

In 1955, the matter of proof of common carrier was again before the courts in the case of *Politano v. United States*, 220 Fed. (2d) 217 (C.C.A. 10th, 1955). The decision of the circuit court did nothing to detract from the decision in the *Coltabellota* decision (*supra*) but merely stated that proof of common carrier may be made by other than direct evidence, and determined that from the facts there in evidence, there was sufficient testimony to sustain the trial court's finding, although the right of the trial court to take judicial notice of common carrier status was denied.

The *Politano* decision (*supra*) is, furthermore, distinguished from the instant case upon facts alone. In the cited decision, there is direct evidence that the victim actually boarded and travelled as a passenger upon the Continental Bus Lines in interstate commerce; there is direct evidence that the bus upon which she travelled was a scheduled carrier, and that the madam was able to determine the time of the victim's arrival by reference to bus schedules. In the instant case, such direct evidence is wholly lacking. Only

by inference can it be assumed that Mrs. West even boarded the Western Airline plane, and it requires a further inductive leap, based solely upon this inference, to assume if Mrs. West did board a Western Airline plane, that it was a flight open to the general public as a common carrier. As was stated in the *Coltabellota* decision (*supra*), such proof "does not rise above mere probability" that Mrs. West travelled by common carrier.

Briefly summarized, then, it is the position of the Appellant Heller that proof of transportation by common carrier is wholly insufficient. What evidence there is, as disclosed by the record, is circumstantial, and requires inference to be pyramidded upon inference to sustain the verdict. All the necessary evidence was presumably available to the government, and it must be presumed that the government's failure to present it at the trial was due to the fact that such evidence was unfavorable to the prosecution.

III.

THE EVIDENCE AGAINST THIS APPELLANT IS INSUFFICIENT TO SUPPORT THE VERDICT

In addition to the specific matters hereinbefore considered, it is submitted that the evidence as contained in the Record is wholly insufficient to sustain the verdict as against this appellant, Victoria Ruth Foughty Heller.

As has been previously noted, Mrs. Heller and her co-defendant, Cedric Theodore Berg, were charged and tried jointly, as principals, with no allegations of

conspiracy. Indeed, the record contains not a whisper of testimony or other evidence from which the jury might infer that the parties acted in concert in the commission of the alleged offense.

It is admitted that if the jury chose to believe the testimony of the alleged victim, the record contains testimony of Mrs. West from which the jury might well believe that the purpose of the alleged trip was the practice of prostitution in Seattle, Washington. Such evidence, however, is contained in the testimony of Mrs. West relative to certain conversations had, in person, with Mr. Berg at Los Banos, California during August, 1954, and March, 1955. It is to be remembered that these conversations took place prior to the time that Mrs. West, the alleged victim, ever met or even conversed by long-distance telephone with Mrs. Heller. Since the Indictment contained no allegations of conspiracy, and since the government at no time maintained that the parties acted in concert, these conversations are pure hearesay as to Mrs. Heller, and the court repeatedly sustained objections to the admission of these conversations in the consideration of the guilt or innocence of Mrs. Heller (R. 24, 28, 31, 32, 38).

If the wheat be separated from the chaff, and the evidence admissible against Mr. Berg and inadmissible against Mrs. Heller be stricken, the government's case against Mrs. Heller boils down to Mrs. West's testimony that: (1) She had two brief telephone conversations with Mrs. Heller prior to coming to Seattle,

(R. 102-106) (2) She spoke to Mrs. Heller by telephone from the Seattle airport, (R. 104) and (3) that she committed three acts of prostitution at the home of Mrs. Heller (R. 44, 45,) for which she received \$100.00, which sum she divided with Mrs. Heller (R. 46). In passing, it should be noted that the alleged victim is an admitted common prostitute (R. 50, 51), and certainly her testimony should be most carefully scrutinized, particularly where it constitutes the sole evidence upon which the conviction of Mrs. Heller could be sustained.

The only evidence admitted by the trial court (as against Mrs. Heller) relative to the content of the pivotal telephone conversations between Rose West and Mrs. Heller is contained in the testimony of the alleged victim upon cross examination, and upon re-direct examination. The testimony of this witness upon direct examination relative to this subject was held inadmissible as to this appellant (R. 24, 25, 31, 32, 38) For the convenience of the Court, this testimony is set forth at length as follows:

The First Telephone Call:

By Mr. Gutersen (Re-direct examination)

Q. The first time that you spoke on the 'phone to Mr. Berg on the early Sunday Morning Call when you were in Los Banos and received a call from him, did you also talk to someone on the 'phone besides Mr. Berg?

A. "I talked to "Vicky".

Q. The first call on that Sunday Morning; what conversation did you have with a lady named "Vicky"?

A. She talked to me and said "Are you going to come up? Teddy told me about you. Why don't you come up?" (R. 102, 103)

On Re-Cross examination, the witness testified as follows relative to this first telephone conversation:

By Mr. Kosher:

Q. What did you say exactly; what were her exact words on that first conversation? Can you tell me that?

A. I don't know whether I can tell exact words or not but in talking she said "Why don't you come up and try it." She said everything was O.K. "You can stay at the house with me. It is good and you can stay right here. Come and give it a try."

Q. Now, at no time did she tell you to get on the plane and to come up here, that you could practice prostitution in her home after you got here, did she?

A. She didn't use the word "prostitute". (R. 105, 106)

The Second Telephone Call:

By Mr. Guterson. (Re-direct examination)

Q. Relate the conversation between you and Vicky on this occasion?

A. She wanted to know why I didn't come up and I said I didn't have the money and she said they would send me the money and "if you don't have your clothes ready, just throw them in a suit case and you can straighten them out after you get here." (R. 104)

Mrs. West subsequently testified that upon her arrival at the Seattle airport, she called the telephone number of the Heller residence and talked to Mrs. Heller (R. 104). When she was asked on direct examination who had furnished that telephone number, her answer was as follows:

Q. Who told you to call that number?

A. Teddy gave me the number to call. (R. 37)

The testimony of the government's own witnesses disclosed that Mrs. Heller had nothing to do with the sending of any monies to Mrs. West, and exhibits Nos. 1, 2, 3, and 4 evidencing the sending and receipt of the telegraphic money order were held inadmissible against appellant Heller (R. 137)

The above quoted testimony, and the testimony of the alleged victim relative to certain acts of prostitution committed at the Heller residence (R. 44, 45), and the division of the proceeds thereof with Mrs. Heller (R. 36) constitute the entire case of the government against this appellant.

Marshalled against these shreds and scraps of testimony, is the uncontroverted testimony of Mr. Berg

that he told Mrs. Heller that Mrs. West was coming to Seattle to marry him (R. 307); Mr. Berg's denial that any acts of prostitution took place at the Heller home after the arrival of the alleged victim (R. 311, 312); and the testimony of the victim herself (R. 47) [and corroborated by Mr. Berg (R. 318, 319), Mr. Busby (R. 187) and the appellant herself (R. 269)] that Mrs. West left the Heller residence, obviously in high dudgeon, after being accused of stealing money from Mr. Busby.

It is true that the jury had a right to give such credibility to the various witnesses as they saw fit. Nevertheless, before a verdict of "guilty" could be returned against Mrs. Heller, the jury was required to find competent, material, and relevant evidence against Mrs. Heller which could fix her guilt beyond a reasonable doubt. This evidence is simply not in the record.

On the contrary, it is apparent that the jury, despite the instruction of the trial court to consider the evidence separately against each defendant, (R. 346, 350), imputed to Mrs. Heller the acts and conversations of the defendant Berg, and found the defendants had conspired together to bring about the prohibited traffic in interstate commerce. For it is only with the background of the conversations between Mr. Berg and the alleged victim that reasonable minds could conclude that the telephone conversations between Mrs. Heller and Mrs. West were intended to induce the alleged victim to come to Seattle for im-

moral purposes. Had these defendants, Mrs. Heller and Mr. Berg been tried separately, and the inadmissible portions of the testimony never placed before the jury, it is inconceivable that such a verdict could have been rendered by reasonable men and women.

It is therefore respectfully submitted that the evidence adduced *as against Mrs. Heller* is insufficient to rebut the presumption of innocence, and that the government failed to prove the guilt of this defendant beyond a reasonable doubt. The verdict, as to Mrs. Heller, should be reversed upon this ground.

IV.

THE COURT ERRED IN ADVISING THE JURY THAT THE PURPOSE OF THE MANN ACT WAS TO PREVENT IMMORALITY:

In its charge to the jury and the conclusion of the trial, the Court instructed the jury as follows: (R. 347)

“The law under which this indictment has been returned is a Congressional exercise of rightful power forbidding the use of interstate transportation and commerce as an agency to promote immorality such as prostitution and debauchery.”

“The law is directed against the use of interstate transportation or commerce for immoral purposes or in promoting or carrying out such purposes.”

It is submitted that the above-quoted portions of the Court's instructions, gratuitously stated, calling the attention of the jury to the purpose of the law, could do nothing by way of aiding the jury in its deliberations, and could result in nothing but prejudice to the defendants.

It is the appellant Heller's position that the purpose of the law, without comment of the Court, is so patent and obvious that the comment of the trial judge must necessarily cause a juror to seek a reason for such redundant remarks. In seeking such justification, the juror might well conclude that, in the opinion of the judge, the purpose of the particular statute was well suited to the defendants whose fate the juror must decide.

Comments upon the history, object or purpose of the law are not the proper subject of instructions. The court performs its full duty in charging the jury as to matters of law when it states what the law is, without any exposition upon its reasons (33 *Am. Jur., Trial, Sec. 628*).

All the foregoing is particularly appropriate when one considers that the entire case propounded by the government rested upon the testimony of an admitted prostitute. (R. 50, 51) Though it be within the province of the jury to determine the credibility of this witness, in a trial where the evidence was as meagre as in the instant case, any tipping or weighting of the scales of justice must be scrupulously avoided,

and the defendants afforded a fair and impartial trial.

While not directly in point, the remarks in *Billeci v. United States*, 87 App. D.C. 274, 184 Fed. (2d) 394, 24 A.L.R. (2d) 881 (1950) are appropriate.

“A federal trial judge in a criminal case is (sic) not an inert figure. He is not a mere moderator. Besides his own exclusive functions of conducting the trial and declaring the applicable law, he may guide and assist the jury in its consideration of the evidence. The purpose of this comment is to aid, through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In exceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused. Of course, he may direct judgment of acquittal under proper circumstances.

“Moreover, other indestructible principles of our criminal law are pertinent to the comment of a judge upon the evidence. An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilt cannot be returned. These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is, when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

“The public interest requires that persons who have committed crimes be convicted of them. But the responsibility for producing the evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task. The prosecutor represents society in the prosecution. The attorney for the defense represents the accused. The judge is a disinterested and objective participant in the proceeding. ‘Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.’

“The difference between assisting the jury,

which is a duty of a federal judge, and encroaching upon its responsibilities, which is forbidden, has been developed at great length many times, as we have pointed out. When a federal judge comments upon evidence by expressing his opinion upon phases of it, he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's. Therefore he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his, to make; and he must do so in such manner and at such time that the jury will not be left in doubt; references in some remote or obscure portion of a long charge will not suffice for the purpose.

“After a jury has returned a verdict of guilty the defendant is no longer the accused but is the convicted. It is at that point, and not until that point, that punishment becomes a function of the judge.”

Furthermore, the quoted remarks of the trial court, while perhaps of interest to the legal profession, were unsuitable to be given juries for their guidance. These remarks, included as they were within the charge to the jury, at best could be interpreted as no more than a directive to the jury, from the bench, for enforcement of the particular statute in the case at bar. While it may be true that such a directive or appeal may be proper when forthcoming from a public prosecutor, a partisan in the trial, such remarks

are inappropriate when issued from the bench, the unbiased mediator of the proceedings.

We hasten to state at this point that we do not here imply that such a result was ever contemplated by the district court, nor do we believe that the court, at any time, intended to express to the jury any conclusion he may have reached during the course of the trial. We do feel, however, that these inadvertent remarks by the court could do nothing to assist the jury, and must, of necessity, prejudiced the appellant's cause in the eyes of the jury.

CONCLUSION

For the reasons stated, the judgment should be reversed, and the charge dismissed as against this appellant, Victoria Ruth Foughty Heller.

Respectfully submitted,

MAX KOSHER

Attorney for Appellant

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

VICTORIA RUTH FOUGHTY HELLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

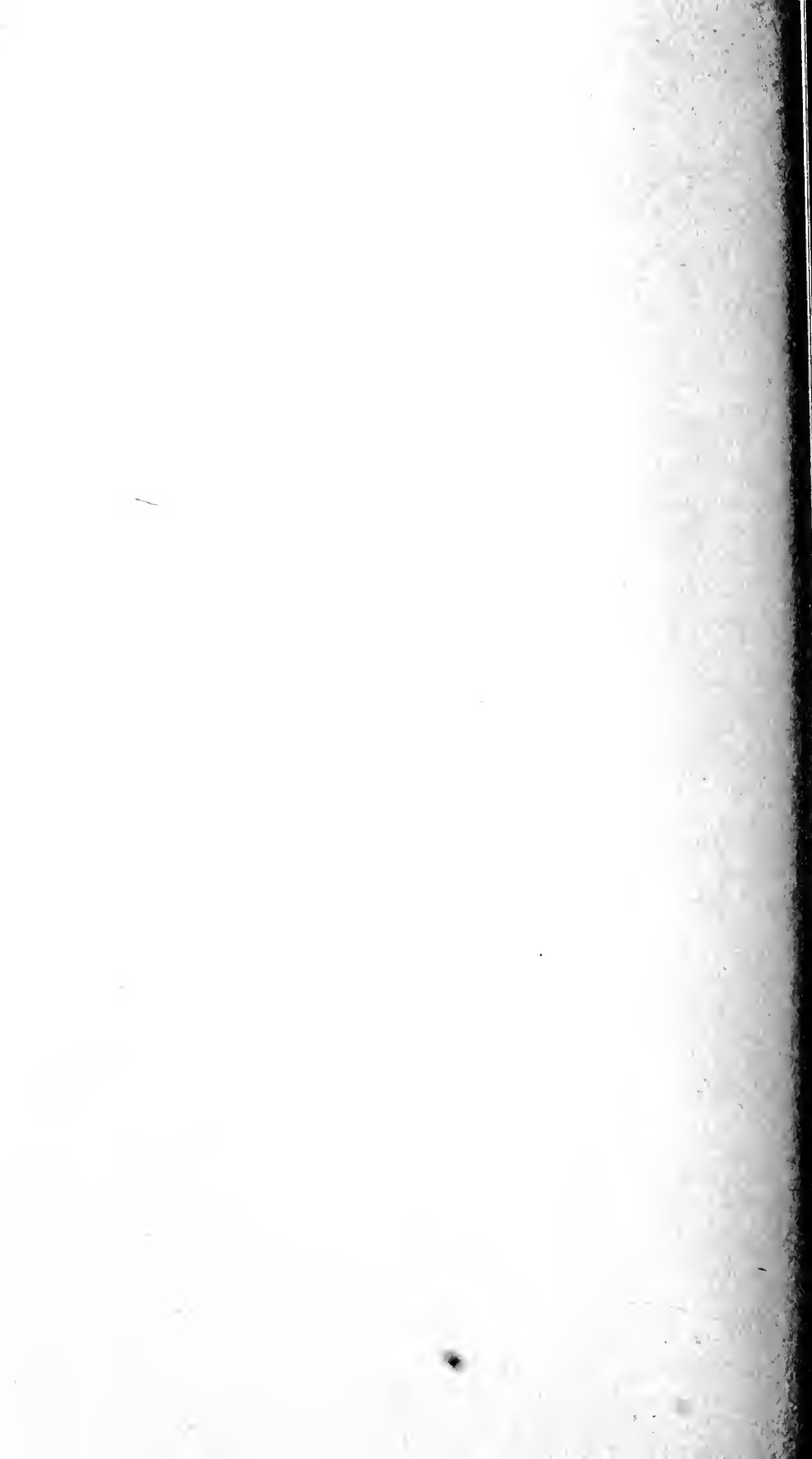
HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

The appellant, Victoria Ruth Foughty Heller, was indicted in the District Court of the United States for the Western District of Washington, Northern Division, in Cause No. 49239, on June 22, 1955. She, together with a codefendant, Cedric Theodore Berg,

was accused of having violated Title 18, United States Code, Section 2422, in the following manner:

“That on or about April 13, 1955, CEDRIC THEODORE BERG and VICTORIA RUTH FOUGHTY HELLER did knowingly, wilfully and unlawfully persuade, induce and entice Rose Drucilla West, a female person, to go from San Francisco, California, to the Northern Division of the Western District of Washington, with the intent that the said Rose Drucilla West should engage in the practice of prostitution, debauchery, and for other immoral purposes, and did thereby knowingly cause the said Rose Drucilla West to go and be transported as a passenger upon the line and route of a common carrier in interstate commerce.

“All in violation of Section 2422, Title 18, U.S.C.

“A TRUE BILL.” (R. 3-4)

Jurisdiction was conferred upon the District Court of the United States for the Western District of Washington, Northern Division, under the provisions of Title 18, United States Code, Section 3231. Since the charge involved the persuasion, inducement and enticement of the named female person to go from San Francisco, California, to the Northern Division of the Western District of Washington, venue was properly laid in said district court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure and Title 18, United States Code, Section 3237.

Trial by jury was had, and a verdict of guilty was returned as to the appellant and her codefendant on September 30, 1955 (R. 4). On November 1, 1955, judgment was entered against both the appellant and the codefendant (R. 7-10), and on November 3, 1955, an order was entered denying the appellant's motion for acquittal and for a new trial (R. 11).

The jurisdiction of this Court to review the judgment of the district court is conferred by the provisions of Title 28, United States Code, Section 1291.

II. STATEMENT OF THE CASE

On April 13, 1955, one Rose Drucilla West, the female named as victim in the Indictment, traveled by plane from San Francisco, California, to the Northern Division of the Western District of Washington (R. 37). Mrs. West testified that during the period immediately preceding that date she was residing in Los Banos, California, some one hundred twenty-six miles from San Francisco (R. 20).

Mrs. West testified that prior to April 13, 1955, and specifically on Sunday, April 3, 1955, she received a telephone call during the course of which she conversed with the appellant (R. 29-31; 102-107). This call was established as having originated at appellant's

residence by the introduction in evidence of the appropriate telephone toll ticket (R. 142).

Mrs. West testified that during this conversation the appellant said:

“Are you going to come up? Teddy told me about you. Why don’t you come on up?” (R. 103)

The witness further testified that during this same conversation, the appellant also said:

Then she said I could stay at the house with her and I didn’t have to stay downtown, or nothing. I could stay right there and I didn’t have to worry about anything. (R. 103).

The witness, Mrs. West, additionally testified that during this same conversation the appellant further told her:

“Why don’t you come up and try it.” She said everything was O. K. “You can stay at the house with me. It is good and you can stay right here. Come and give it a try.” (R. 105)

Mrs. West also testified that the appellant in this same conversation stated:

“Things are all right; things are good.” She said when I got to the airport to call the house and she would meet me at the airport (R. 106).

And further, the following exchange occurred during the testimony of Mrs. West relating to this same phone conversation with the appellant, and in response to a question put by appellant’s counsel:

- Q. Now, Miss West, on your first conversation that you claim you had with Mrs. Heller, she at no time told you she wanted you to come to Seattle for the purpose of practicing prostitution, did she?
- A. She didn't use the words of that but she told me of her place and everything and said it was good money. (R. 105).

In addition to the foregoing, Rose Drucilla West also testified that "a couple of days" after the first telephone conversation, she again received a telephone call during the course of which she again spoke with the appellant herein (R. 32; 103-104). Mrs. West testified that during this second conversation, the appellant inquired as follows:

She wanted to know why I didn't come up and I said I didn't have the money and she said they would send me the money and, "If you don't have your clothes ready, just throw them in a suitcase and you can straighten them out after you get here." (R. 104)

The witness, Rose Drucilla West, additionally testified that on April 7, 1955, she did in fact receive sixty dollars at the American Trust Company in Los Banos, California, which money had been transmitted via Western Union money order from Seattle, Washington (R. 33; 116; 135).

Mrs. West testified that, pursuant to Mrs. Heller's instructions (R. 106), she called the Heller

residence, telephone number Adams 5680, immediately upon her arrival at the airport in Seattle (R. 37). She stated that the appellant answered the phone and told her to "get a cab and come out to the house" (R. 38). Mrs. West testified that soon after arriving at the Heller residence, the appellant spoke to her as follows:

Vicky told me about the way that she worked the prostitution and the way she took the money out and everything (R. 41).

Rose West also testified that the appellant explained the procedures at that time in more detailed fashion as follows:

Well, she told me — Mrs. Heller told me — if I stay in the house and she had all the customers and they all came by call, and if I stay in the house she takes three dollars out of ten dollars when I have intercourse with the men when they pay me, and if I go out she takes four dollars out of the ten dollars. That is the way she divided up the money. (R. 42-43).

Mrs. West went on to testify that on the day of her arrival she had intercourse at the Heller residence with a man for which she received thirty dollars, which act of intercourse occurred while the appellant was present at the house (R. 43-44). Rose West further testified that she performed two additional acts of intercourse the following day while Mrs. Heller was at home, receiving a total of seventy dollars (R. 45). The witness, Mrs. West, stated that the entire one hundred

dollars she received was given to the appellant, who in turn returned Mrs. West the amount of sixty-two dollars (R. 46).

Rose West testified that on the evening of April 12, 1955, and just prior to leaving Los Banos, she "called the airport to see if I could get on the plane" (R. 36). She went on to then testify that when she arrived at the airport it was approximately eleven o'clock, "about one-half hour before the plane left" (R. 36). Further, that immediately upon arrival, she "went up to the Western Airline there and gave my name and got my ticket" (R. 37). She testified that the price of the ticket for a flight from San Francisco to the Seattle airport was "thirty-four dollars and a little bit over" (R. 37). Mrs. West also testified that the plane left San Francisco "at 11:45, right around midnight. The plane was a little late." (R. 37).

Another witness called by the Government, Joe Scarpete of Los Banos, California, testified that he drove Rose West from that community to San Francisco on the occasion in question (R. 109). Mr. Scarpete testified that Mrs. West brought luggage with her and that on arrival at the airport, "she went in first and a porter came and got the luggage" (R. 110). This testimony was substantiated by another witness, Tony Baffuna, who was a passenger in the car during

the drive from Los Banos to San Francisco (R. 112-113).

III. SUMMARY OF ARGUMENT

In her Specifications of Error, appellant sets forth two matters, listing subheadings (a) and (b) under her first Specification. In the Summary of her Argument, however, appellant sets forth four Contentions, each of which is treated in the following portion of her brief devoted to Argument.

Upon a careful reading of these four Contentions, it is our feeling that Contentions I and III are actually the same. Each asserts a failure of proof on the part of the Government as to appellant on the issue of her having persuaded, induced and enticed the interstate trip for the immoral purposes specified. We therefore will divide our Argument into three parts, answering appellant's Contentions I and III in Part A, her second Contention in Part B, and her fourth Contention in Part C.

We contend that the evidence introduced supports the finding that the appellant persuaded, induced and enticed Rose West to travel in interstate commerce, and that in the sense contemplated by the statute, the appellant did thereby knowingly cause the victim to so travel.

We further contend that the evidence supports the finding that the transportation of Mrs. West was as a passenger upon the line and route of a common carrier in interstate commerce.

And, finally, we contend that the instruction of the court, explaining the purpose of the law, was proper, and certainly cannot be relied upon as a sound basis for a claim of prejudicial error.

IV. ARGUMENT

A. Sufficiency of Evidence to Establish Persuasion, Inducement and Enticement on the Part of Appellant.

Appellant's position is that she could not have persuaded, induced and enticed Rose West to travel to Seattle because Rose West had already decided to so travel as a result of the persuasion applied by the co-defendant, Berg. Appellant herein argues that in March of 1955, a matter of ten to thirty days before the first telephone conversation in which she participated, the witness, Rose West, had already decided to come to Seattle. Mrs. Heller continues that, therefore, nothing she may have done can possibly be viewed as having been instrumental in persuading and causing the trip. And the appellant herein concludes, via her third Contention, that even if it were possible for

her to have persuaded the victim to make the trip, there is a total dearth of competent and legally admissible evidence as against her to so establish.

We believe that there was an abundance of evidence which establishes the guilt of the appellant in this regard. We have attempted to set it forth herein under our Statement of the Case, setting out various portions of the actual conversation between the victim and the appellant over the long distance telephone between Los Banos, California, and appellant's residence on Mercer Island, King County, Washington. Incidentally, it should be noted that these conversations, though not testified to till redirect examination, constitute a part of the Government's case in chief inasmuch as it was only to permit argument of counsel that the court asked counsel for the Government to delay his interrogation on these matters (R. 40-41). The court specifically accorded Government counsel the privilege of returning to this subject by ordering him to proceed to another subject with the right to return to these conversations (R. 41).

These conversations clearly demonstrate that the appellant was urging the victim to make the trip, and held out the promise of a place to stay. Can we interpret the words: "It is good and you can stay right here. Come and give it a try." (R. 105) — as words

of anything other than persuasion, inducement and enticement? Is not the appellant doing just what the dictionary definition she sets out in her brief requires; namely, "to draw on by exciting hope or desire . . . often, in a bad sense, to lead astray, to induce to evil . . ."?

Besides, the simple fact is that the trip did not occur until after the two telephone conversations between appellant and victim. Are we to conclude that the content of those conversations does not provide a proper basis for jury consideration as to whether the words spoken operated to persuade, induce and entice? Such a position is completely untenable, and yet it is the one the appellant would have us adopt. The lack of logic in that position is even heightened when we further consider that upon arrival, the victim did actually live at appellant's home, did operate as a prostitute, and did divide her earnings therefrom with appellant. Upon such evidence, we are not compelled to conclude, as appellant would have us do, that the persuasion exerted by her was wholly without some significance.

In this regard, there is no question but that the conduct of the parties within a reasonable time before and after the transportation is admissible as properly bearing upon the intent with which the transportation

occurred. *Kelly v. United States*, (9 Cir. 1924) 297 F. 212; *Ammerman v. United States*, (9 Cir. 1919) 262 F. 124; *Womble v. United States*, (9 Cir. 1944) 146 F. 2d 263; *Long v. United States*, (10 Cir. 1947) 160 F. 2d 706; and *Dunn v. United States*, (10 Cir. 1951) 190 F. 2d 496.

In this same vein, it is also well settled that proof of persuasion, inducement and enticement can arise from the circumstances attending a transportation and from a consideration of the conduct of the parties within a reasonable time before and after. Cases so holding are *United States v. Reed*, (2 Cir. 1938) 96 F. 2d 785, and *United States v. Barton*, (2 Cir. 1943) 134 F. 2d 484.

Thus, we have abundant admissible testimony of actual verbal persuasion, and proof of conduct within the immediate three days after the trip which bears upon this question substantially. Such is unquestionably sufficient to make out a case for jury consideration.

This position is fully corroborated and actually strengthened by an examination of the precedent in this area of law. Such discloses that it is not even incumbent upon the Government to present a witness who will testify that she conversed with the defendant on trial and was told to do a particular thing or

to go to a particular place. In fact, even in the face of a witness who testifies that she was definitely not persuaded, induced or enticed to do a particular thing or to go to a particular place, circumstantial evidence will be deemed sufficient to prove these things. In this regard, there is an excellent *per curiam* opinion, concurred in by Judges Learned Hand, Augustus Hand, and Frank, in the case of *United States v. Barton* (2 Cir. 1943) 143 F. 2d 484, *supra*. That case involved a prosecution under former Section 399 of Title 18 of the United States Code, which section has now been codified, with slight alteration, as Section 2422, Title 18, United States Code.

The Court in that case stated, in part, as follows:

“It is true that the girl herself vigorously denied that the accused had induced her to go, but the jury need not have accepted that, because from her testimony it appeared that it was her habit, when the accused called upon her, to entertain the customer selected for her, and to divide her earnings equally with the accused.”

The case of *United States v. Reed*, (2 Cir. 1938) 96 F. 2d 785, *supra*, takes the exact same position. In that case, which was also prosecuted under the same portion of the White Slavery Act, the prosecuting witness testified that she was not persuaded or induced to go from Florida to New York by the appellant “because she had always wanted to go there and paid her

own transportation expenses." The Court still held that the jury had a right to consider all of the circumstances, and upon so doing could go beyond this testimony of the prosecuting witness and conclude that there was persuasion and inducement.

Another authority which casts considerable light on this discussion is the decision in *Cwach v. United States*, (8 Cir. 1954) 212 F. 2d 520. In that case, the defendant, Frances Cwach, was a woman who operated a house of prostitution in Sioux Falls, South Dakota. The victim therein, one Gloria Jordell, testified that she spoke with Frances Cwach over the long distance telephone line, pursuant to a telephone call placed by a codefendant of Cwach from Minneapolis, Minnesota, to Sioux Falls, South Dakota. The testimony concerning that portion of the case was as follows:

Q. All right. Now, at the time you had the telephone conversation you had been talking to Sutton, Batsell and Moore for all of that evening, is that correct?

A. Not all evening, I would say maybe two or three hours.

Q. Two or three hours, and it was decided that you would go down to Sioux Falls, is that correct?

A. That's correct.

Q. And your decision had been made?

A. Yes.

Q. And then a phone call was placed, is that correct?

A. I hadn't made up my mind until I talked on the phone.

Q. Well, you stated that your decision had been made. Now, what is the Court and jury to believe?

A. I wasn't sure I could even get into Frances' place at Sioux Falls.

Q. In other words, you were going down there if she would have you, is that correct?

A. Yes, that's correct.

Q. So the decision for you to go had been made prior to the phone call?

A. If I could get in, yes.

The defendant Cwach argued that this evidence was insufficient to show that she induced, enticed or persuaded Gloria Jordell to come from Minneapolis to Sioux Falls to engage in the practice of prostitution. The Court, in refusing to accept this contention, held as follows:

"Together with the direct testimony of the witness that defendant Cwach assured her that she would get along fine working in a house of prostitution, we think this evidence clearly warranted the jury in finding that defendant Cwach induced, enticed, or persuaded Gloria Jordell to travel in interstate commerce for the purpose of prostitution. A conviction has been sustained under the Act where, as part of the inducement, the defendant gave assurance of a place and a means to practice. *Schrader v. U. S.*, 8 Cir., 1938, 94 F. 2d 926;

U. S. v. Sorrentino, D.C. Pa., 1948, 78 F. Supp. 425; affirmed 3 Cir., 1949, 175 F. 2d 721."

In the present case, the appellant, Heller, gave assurance of a place to live as well as a place to practice prostitution. There can be no question but what her conversations with Rose West during the telephone calls placed to Los Banos, California, especially when considered in conjunction with the acts that occurred immediately upon Mrs. West's arrival, provided a proper basis for jury deliberation as to whether what the appellant said did in fact persuade, induce and entice.

Before concluding this portion of our Argument, we wish to briefly dwell on what proof is necessary to permit jury consideration as to whether the persuasion, inducement and enticement caused the transportation in the sense contemplated by the statute. The Court in the case of *United States v. Saledonis*, (2 Cir. 1937) 93 F. 2d 302, while considering a prosecution brought under the section of the White Slave Traffic Act which is now codified in Section 2422, Title 18, United States Code, stated as follows:

"The contention that there can be no conviction under Section 3 (18 U.S.C.A. § 399) unless it is shown further that the accused 'in some manner directly contribute to the transportation of the girl by common carrier' is unsound.

"It is also suggested that there must be some

direct act showing an intent on the part of the inducer that the transportation shall be by common carrier. This section does not say so, but plainly says that one who induces and who shall 'thereby knowingly cause' interstate commerce by common carrier is guilty of the offense if such transportation follows: An affirmative directive act is not involved. The inducement in and of itself, without consideration of intent and with no further direct act, is the moving cause of what follows. The inducement may be any offer sufficient to cause the woman to respond. The inducement sets in motion the successive acts that constitute the crime. It is unnecessary to show control of the medium of transportation by the inducer. It is sufficient if the accused knows or should have known that interstate transportation by common carrier would reasonably result and if it does."

This same view is adhered to in the case of *Hardie v. United States*, (5 Cir. 1953) 208 F. 2d 694.

In the instant case, we have even a stronger showing because of Mrs. Heller's actual statement during the course of her second conversation with Rose West via long distance telephone that— "and she said they would send me the money" (R. 104).

Thus herein, there was substantial evidence of persuasion, inducement and enticement practiced by the appellant which thereby knowingly, as contemplated in the statute, caused the interstate transportation by common carrier for the immoral purposes alleged.

B. *Evidence That Transportation Was By Common Carrier*

In order to ascertain if the Government's proof was sufficient to permit the jury to determine whether the transportation was by common carrier, we should initially determine what test is to be applied in measuring that proof. An extensive examination of the authorities leads us to the conclusion that the proper test we must apply, or proper question we must ask, when all evidence has been submitted, is this:

Did the Government introduce some competent evidence upon which a jury could properly proceed, drawing those inferences which reasonably flow therefrom, to a finding that the mode of transportation was by common carrier?

We have set up this test for ourselves after examining the following cases:

United States v. Feinberg, (2 Cir. 1944) 140 F. 2d 592;

United States v. Pape, (2 Cir. 1944) 144 F. 2d 778;

United States v. Cohen, (2 Cir. 1944) 145 F. 2d 82;

United States v. Hall, (2 Cir. 1952) 198 F. 2d 726;

United States v. Spagnuolo, (2 Cir. 1948) 168 F. 2d 768;

Curley v. United States, (D.C. Cir. 1947) 160 F. 2d 229.

The last cited case referred to this matter in the following language:

“The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.”

We have further examined the precedent in this Circuit, and find that the same test is applicable. This is revealed by the examination of a portion of the opinion in the case of *Banks v. United States*, (9 Cir. 1945) 147 F. 2d 628, which reads in part as follows:

“An appellate court is limited in its review of the sufficiency of the evidence to the consideration of whether there was some competent and substantial evidence. On a motion for directed verdict, there is a preliminary question for the trial judge — whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. O’Brien’s Manual of Federal Appellate Procedure, 3rd Ed., 1941, c. III, p. 16.”

The case of *Presley v. United States*, (9 Cir. 1945) 148 F. 2d 634, quotes the *Banks* case language just set out with approval.

Now that we have determined a proper criterion, let us apply it to cases which have been concerned with common carriers. At once we are confronted with *Coltabellotta v. United States*, (2 Cir. 1930) 45 F. 2d 117, which holds that testimony that a bus was driven by a conductor from Manhattan to Bogota, New Jersey, and took twenty passengers with tickets was not sufficient to submit the issue of "common carrier" to the jury.

Just seven years later, the Second Circuit, in an opinion by the same three judges who considered the *Coltabellotta* case, handed down a decision in *United States v. Saledonis*, (2 Cir. 1937) 93 F. 2d 302, *supra*. The holding therein was that an instruction advising the jury that the proof of transportation by common carrier need not be by direct evidence was not subject to criticism. No facts are set forth and the *Coltabellotta* case is not referred to, so it is difficult to formulate an opinion as to whether or not the 1937 thinking of the Court would have permitted the 1930 evidence to have been made the subject of jury consideration.

In the civil law field, the case of *Kamienski v. Bluebird Air Service*, (1944) 53 N.E. 2d 131, held

that proof that plaintiff purchased a ticket and was a passenger on defendant's twelve passenger sightseeing plane was sufficient to establish defendant as a common carrier. The opinion in *Cudney v. MidContinent Air Lines, Inc.*, (1953) 254 S.W. 2d 662, goes even further in holding:

"However a commercial airline carrying passengers for hire is a common carrier and subject to the duties and liabilities of common carriers."

Thus, if we apply our test to the facts of a given prior case, i.e., did the proof bring forth some competent evidence upon which a jury could properly find the transportation involved to have been by common carrier, we could hardly state at this juncture that a decision reached in one case would necessarily influence another. Quite properly then, we should set forth every pertinent fact of the instant case, and then determine as a matter of logic whether we produced some evidence from which reasonable people could properly conclude that the mode of transportation herein was by common carrier.

This we have attempted to do in the concluding portion of our Statement of the Case, where we have quoted extensively from the testimony of Rose West (R. 36-37), as it bears upon this question, and also briefly alluded to testimony of two other witnesses called by the plaintiff.

Briefly, then, the record shows proof in the following particulars:

That Rose West left Los Banos by automobile with three friends at about 8 P.M. on April 12, 1955; that they arrived at the San Francisco airport around eleven o'clock "about one-half hour before the plane left"; that a porter emerged from that airport after Rose West first entered and carried her luggage for her; that before leaving Los Banos, Rose West had called the airport in San Francisco in order to determine if there would be room on the plane; that upon arrival at the San Francisco airport, Rose West went immediately to the Western Airlines window or place or business at the airport; that she simply gave her name to the person there and picked up her ticket; that she paid thirty-four dollars and some cents for her ticket; that this was the price charged for a flight from San Francisco to the Seattle airport; that "the plane was a little late" in leaving San Francisco, but that it took off "right around midnight" (R. 36-37).

Does the foregoing proof, and the inferences which reasonably flow therefrom, represent some competent evidence upon which a jury could proceed to a finding that the transportation of Rose West was upon a carrier which held itself out to the public as

engaged in the business of transporting persons or property from place to place for compensation?

We set out the foregoing question inasmuch as it is an accurate paraphrase of the court's instruction (R. 346), to which instruction no exception was taken, and which therefore became the law of the case. Now, certainly, the following inferences are reasonable ones:

That the carrier which transported Rose West had a definite place of doing business; that the carrier which transported Rose West took reservations by phone; that therefore the carrier which transported Rose West made space available to a member of the public by taking reservations by phone; that the carrier which transported Rose West did transport a person from one place to another for compensation; that the carrier which transported Rose West did issue a ticket to a person who had reserved space and who paid a prescribed compensation; that the carrier which transported Rose West was scheduled to leave the airport in San Francisco for Seattle at a definite prescribed time; that the carrier which transported Rose West was a plane operated by Western Airlines.

Quite assuredly then, we have a great deal of evidence from which, as a proposition of logic, a jury could unhesitatingly conclude that the mode of trans-

portation was by common carrier as that term was defined to them by the court. After all, the court, again without exception, had advised and counseled the jury as follows:

“You must use your common sense, as men and women possessing some knowledge of the ways of the world, and, if, after examining carefully all the facts and the circumstances established by the evidence in this case, you can feel and say that you have a settled and abiding conviction of the guilt of the defendants, then you are satisfied beyond a reasonable doubt.” (R. 342)

In addition, there are many circumstances herein which are considerably stronger than those in the *Coltabellotta* case, *supra*. There was no evidence at all in that case that the bus reserved space and took reservations by phone; there was no evidence whatsoever in that case that the bus catered to a prescribed schedule and left a certain point at a certain time; and, most pointedly, there was absolutely no showing that the bus belonged to a network or system within the common knowledge of all the populace; no evidence that the bus bore a name of significance.

The extreme importance of this last referred to circumstance is made abundantly clear by an examination of the most recent decision in this area of law, *Politano v. United States*, (10 Cir. 1955) 220 F. 2d 217. In that opinion, it was squarely stated that the

trial court could properly take judicial notice that in going from Price, Utah, to Grand Junction, Colorado, by a Continental Bus the victim went as a passenger by "common carrier".

The only facts which the Government's evidence brought to light on this issue in that case were these:

That the victim bought a round-trip ticket from Price, Utah, to Grand Junction, Colorado, at the Continental Bus Depot at Price, Utah; that the bus was late; that the bus stopped at the bus depot in Grand Junction; that the Chief of Police of Price, Utah, had observed the victim taking the eastbound bus out of Price, Utah, around noon; and absolutely nothing more. There was not a scintilla of any kind of evidence that the bus even took reservations, or that it was available to all members of the public indiscriminately, or that it had a specified price for transporting a person from a definite place to another definite place. And yet the Tenth Circuit clearly held that there were sufficient facts to sustain the finding of the trial court that Continental Bus Lines was "a common carrier".

In this connection, it is well to point out a facet of the *Politano* case result, which is of added significance. This is the circumstance that that case was tried to the court sitting without a jury, and hence the finding which the trial court made was not simply that the

circumstances were strong enough to permit submission of the case to the trier of the facts, but that the circumstances were sufficiently appealing to result in the finding that the transportation was by common carrier beyond a reasonable doubt.

On examination also, it can readily be seen that the *Politano* proof did not even include a showing that the bus took other passengers, which, of course, was established in the *Coltabellotta* case, *supra*. In short, the *Politano* facts are, if anything, less persuasive than those in the *Coltabellotta* case, except for one essential ingredient — the bus is named in the *Politano* case as a member of a well known line, Continental Bus Lines.

Our case, of course, concerns a transportation by Western Airlines, and coupling that circumstance with all attendant matters bearing on the type of flight involved as pointed out earlier herein, there was unquestionably sufficient evidence to submit the question of whether the transportation was by common carrier to the jury.

C. *Court's Right to Advise the Jury as to the Purpose of the Law Involved*

Appellant lastly contends that prejudicial error was visited upon her by the court in its instruction to the jury as follows:

“The law under which this indictment has been returned is a Congressional exercise of rightful power forbidding the use of interstate transportation and commerce as an agency to promote immorality such as prostitution and debauchery.

* * * * *

“The law is directed against the use of interstate transportation or commerce for immoral purposes or in promoting or carrying out such practices.” (R. 347)

This instruction represents a comment by the trial court in effect advising the jury as to the purpose of the White Slave Traffic Act, and its basis in federal jurisdiction. The right to comment by the trial judge in the federal courts is a long recognized one, as is seen by examination of any number of cases:

Lovely v. United States, (4 Cir. 1949) 175 F. 2d 312;

Myres v. United States, (8 Cir. 1949) 174 F. 2d 329;

Fredrick v. United States, (9 Cir. 1947) 163 F. 2d 536;

Petro v. United States, (6 Cir. 1954) 210 F. 2d 49;

Lott v. United States, (5 Cir. 1956) 230 F. 2d 915.

The following passage is in order in this discussion:

“Appropriate in this connection are the observations of Mr. Justice Harlan in *Rucker v. Wheeler*, 127 U.S. 85, 93, 8 S.Ct. 1142, 1146, 32 L.Ed. 102:

“‘It is insisted by the plaintiff that the court

went too far in its expressions of opinion upon the evidence bearing upon this issue and that what was said had practically the effect of taking the case from the jury. It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury may, in his discretion, express his opinion upon the facts; and that "when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury," such expressions of opinion are not reviewable on writ of error'."

Fredrick v. United States, (9 Cir. 1947) 163 F. 2d 536, 548, *supra*.

As the case of *Lott v. United States*, (5 Cir. 1956) 230 F. 2d 915, *supra*, states, in reaffirming this right:

"And a federal court may express its opinion even with respect to the facts if it is made clear to the jury that they need not be bound by this opinion."

Because of this, it is well to note the portion of the court's charge in the instant case found at page 353 of the Record:

"As to what the facts prove, should you have an opinion that the Court, because of any ruling or because of any comment made or because of anything stated in these instructions, has expressed an opinion as to the guilt or innocence of the defendants or as to the credibility or weight of the testimony of any witness, I want to advise you that you should not be controlled or influenced in any respect by the Court's ruling when you are considering what the facts are. The Court's rulings are binding so far as you are concerned as to the law. So, again, what the facts

are, what you find them to be, that is your responsibility." (R. 353)

In the light of this statement, we cannot conclude that there was anything erroneous in the court's charge. After all, the court simply, and accurately, told the jury what Congress had in mind in passing this law. That what the court told the jury was a correct statement of the Congressional purpose is beyond question. See *Mortensen v. United States*, (1944) 322 U.S. 369.

Actually, the Court's language was, to our thinking, favorable to appellant. It advised the jury that the federal court in this prosecution is not interested in prescribing what moral standards must be adhered to in the community; further that the federal law does not punish anyone for being morally irresponsible. Instead, the court tells the jury that the federal law is only "directed against the use of interstate transportation or commerce for immoral purposes or in promoting or carrying out such practices." (R. 347).

This language could not help but intensify the jury's attention to the crucial point that what must be proven was the employment of interstate commerce to promote immorality. Such being the law, and the court having a duty to expound the law, and the court having told the jury to determine the facts, there can be no error predicated thereon.

V. CONCLUSION

The Government believes that the appellant herein was accorded a fair trial in all respects, and that the jury's verdict was based on substantial evidence. Because of this, we ask that the judgment be affirmed.

Respectfully submitted,

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NO. 15,001

In the United States
Court of Appeals
for the Ninth Circuit

ROGUE MADRONA BANEZ,

Appellant,

vs.

JOHN P. BOYD, District Director
of Immigration and Naturalization
Service, United States Department
of Justice, and Roy J. Norene,

Appellees

On Appeal from the United States District Court for the
District of Oregon

BRIEF OF APPELLEE
ROY J. NORENE

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NO. 15,001

In the United States
Court of Appeals
for the Ninth Circuit

ROGUE MADRONA BANEZ,

Appellant,

vs.

JOHN P. BOYD, District Director
of Immigration and Naturalization
Service, United States Department
of Justice, and Roy J. Norene,

Appellees

On Appeal from the United States District Court for the
District of Oregon

BRIEF OF APPELLEE
ROY J. NORENE

OPINION BELOW

The District Court's opinion (R.21-23). There were no findings of fact or conclusions of law made or entered by the Court below.

JURISDICTIONAL STATEMENT

Appellant brought suit against appellee Roy J. Norene in the United States District Court for the District of Oregon,

which Court had jurisdiction of this cause under Title 28 United States Code, Section 2241. An order of the District Court of Oregon denying the writ of habeas corpus was entered on December 12, 1955 (R-24.) Notice of Appeal was filed on December 14, 1955 (R-53). The jurisdiction of this Court to review this cause is found in 28 U. S. C. 1291.

STATEMENT OF THE CASE

Appellant is a native and citizen of the Philippine Islands, having resided there continuously from the year 1918, the date of his birth, until the year 1939. He then left Manila, P.I., as a stowaway (R-30) aboard a freighter, the SS SAGOLAND, bound for the United States of America. The vessel arrived in the United States on May 4, 1939. When the vessel docked in the United States appellant was in hiding aboard said vessel and then left the ship at night and came ashore. On December 21, 1945 at Los Angeles, California appellant signed on as a member of the crew of the SS LOUIS A. MILNE. The vessel proceeded to the Philippine Islands. On its return voyage to the United States it docked in Honolulu, T.H., on or about February 26, 1946, at which time appellant was still employed on said vessel as a member of its crew. At that time appellant was ordered detained aboard the vessel for the reason that he was not in possession of a valid passport or other document in lieu thereof. The vessel then proceeded to San Francisco, arriving there on or about March 6, 1946. Appellant having obtained a Philippine document

of identity, his detention was subsequently cancelled and he was permitted to leave the ship.

Subsequently appellant was arrested pursuant to a Warrant of Arrest duly executed on the 9th day of March, 1949, the material portions of which Warrant of Arrest are set out herein as Appendix A. A deportation hearing was duly held by the Immigration and Naturalization Service in Portland, Oregon on November 10, 1952, whereupon the Hearing Officer made findings of fact, conclusions of law and final order, the material portions of which are set forth herein as Appendix B.

At the hearing before the Immigration and Naturalization Service appellant filed with the Hearing Officer an application for suspension of deportation (Exhibit 6 of Immigration file herein). In the Hearing Officer's report under the heading "Discussion" and on Page 2 thereof, after discussing the merits of the application for suspension, he stated as follows: "Suspension of deportation will be denied as a matter of administrative discretion."

Appellant filed exceptions to the findings and conclusions of the Hearing Officer and an appeal was taken to the Board of Immigration Appeals. The Board of Immigration Appeals on the 9th day of November, 1954, ordered that appellant's exceptions, including his application for suspension of deportation, were without merit. The pertinent portions of the said order are set forth herein as Appendix C.

A Warrant of Deportation was duly made on the 7th day of February, 1955, the material portions of which are set forth herein as Appendix D.

Appellant having surrendered to Roy J. Norene, appellee herein, pursuant to said Warrant of Deportation, filed in the court below his petition herein designated "Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action". John P. Boyd, whose name likewise appears in the title of this appeal and in the proceedings in the court below as one of the respondents, was not validly served with process in the court below and is not a party to this appeal. Upon the court below denying the petition for writ of habeas corpus this appeal was taken.

QUESTIONS PRESENTED

I.

Was a resident Filipino citizen, who was also a national of the United States, required to present an unexpired visa to permit entry into the continental United States on May 4, 1939 and on March 6, 1946?

II.

Were entries made into the United States by appellant on May 4, 1939 and March 6, 1946 within the meaning of the immigration laws?

III.

Was the Warrant of Deportation of Banez, based upon his illegal entry into the United States on May 4, 1939, valid since his arrest was originally made for improper entry in 1946?

IV.

Was the Warrant of Arrest nullified by statements of government counsel at the trial before the United States District Court?

V.

Did Section 2 of the Act of August 7, 1939, 53 Stat. (Part 2) 1230, amending Section 8 of the Act of March 24, 1934, 48 Stat. 456,462, repeal or modify subsection (a) of Section 8 of the 1934 act?

VI.

Was the hearing before the Hearing Officer unfair?

VII.

Was there an abuse of discretion by the Immigration and Naturalization Service in refusing to grant Banez a suspension of deportation?

ARGUMENT

I.

A RESIDENT FILIPINO CITIZEN, WHO WAS ALSO A NATIONAL OF THE UNITED STATES, AND WHO DESIRED TO EMIGRATE TO THE CONTINENTAL UNITED STATES ON EITHER MAY 4, 1939 OR MARCH 6, 1946, WAS REQUIRED TO PRESENT AN UNEXPIRED VISA BEFORE A VALID ENTRY COULD BE MADE.

The contention of appellant is that from the time of the passage of the Philippine Independence Act of 1934, (48 Stat. 456) and until said act became fully effective on July 4, 1946, he continued to be an American national and was therefore not subject to deportation for entry into the continental United States without a visa. It is admitted that during said period Banez was an American national; however it did not follow that he was not required to present a visa when he arrived here on May 4, 1939, nor was he exempt from the presentation of a visa upon his entry into this country on March 6, 1946. Section 8(a) (1) of the Philippine Independence Act of March 24, 1934 states in part (at 462) that:

“For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except Section 13(c)), this section, and all other laws of the United States relating to the immigration, exclusion or expulsion of aliens, citizens of the Philippine Islands who are not

citizens of the United States, shall be considered as if they were aliens . . . ”.

The 1934 act was adopted as a preliminary step in terminating American dominion of the Philippine Islands. While it did not actually deprive Filipinos of their American nationality, it demanded that they be regarded as aliens for many specified purposes under the immigration laws. *Mangaoang v. Boyd*, 205 F.2d 553 (C.A.9, 1953) Cert. denied, 346 U.S. 876; *Del Guercio v. Gabot*, 161 F.2d 559 (C.A. 9, 1947). Thus, Filipinos were required to comply with the Alien Registration Act. *Gancy v. United States*, 149 F.2d 788 (C.A.8, 1945), Cert. denied, 326 U.S. 767, rehearing denied, 326 U.S. 810. And even the prohibition of *ex post facto* clause of the Constitution does not apply to deportation of aliens. *Marcello v. Bonds*, 349 U.S. 302. The Congress has broad powers over deportation of aliens. See *Harisiodes v. Shaughnessy*, 342 U.S. 580-589. By the unmistakeable mandate of the statute they were subjected to the conditions for entry imposed by the Immigration Act of 1924, which included the need for presenting immigration visas and a specific quota limitation on entry. Though Filipinos were entitled to certain fundamental personal rights as nationals of a dependency, their rights under immigration laws of the United States were subject to Congressional control. *Gancy v. United States*, *supra*.

Section 213, U.S.C., Title 8 (Immigration), repealed by the McCarran Act June 27, 1952, c. 447, Title IV, Section 403 (a) (23), (66 Stat. 279) provided in part as follows:

"(a) *Persons not to be admitted.*

No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; . . . "

In this connection see *Zacharias v. McGrath, Attorney General, et al.*, 105 F. Supp. 421, at 425 (D.C.. D.C.-1952):

"Aliens who enter the United States must do so in accordance with the statutory provisions enacted by Congress found in Title 8 of the United States Code Annotated.

"Congress has provided in express terms that no immigrant shall be admitted to the United States except with its permission when granted under certain conditions. 8 USCA Sec. 213 . . . "

Continuing quoting from the same case, at page 426:

"If an alien voluntarily leaves this country he is subject to all the provisions of the immigration law whenever he seeks to re-enter. *Lapina v. Williams*, 1914, 232 U.S. 78, 34 S.Ct. 196, 58 L.Ed. 515; *Lewis v. Frick*, 1914, 233 U.S. 291, 34 S.Ct. 488, 58 L.Ed. 967; *Bendel v. Nagel*, 9 Cir., 1927, 17 F.2d 719."

As above stated, Filipinos, while still nationals of the United States, who owed allegiance to the United States, were for immigration purposes considered as if they were aliens, and the Philippine Islands were considered as a foreign country for immigration purposes. See *Barber v. Gonzales*, 347 U.S. 637, 642, where the Court states in part as follows:

"It was not until the 1934 Philippine Independence Act that the Philippines could be regarded as 'foreign' for immigration purposes . . .".

The natives of the Philippines Islands did not become "citizens" of the United States by virtue of the Treaty of Paris. (30 Stat. 1754, 1759) (*Treaty between United States and Spain April 11, 1899, Article 9.*) *Gancy v. U. S., supra.*

Under appellant's Point I, counsel cites the case of *Varleta v. Barber*, 199 F 2d 419, (C.A., 9, 1952). In this case Varleta had obtained a legal residence and was admitted to the Hawaiian Islands for permanent residence in 1931. He came to the continental United States as a stowaway in March, 1935, but was excluded from admission. He was placed aboard a steamship for deportation to the Hawaiian Islands, but escaped from the vessel on April 6, 1935, and made his way into the continental United States where he remained except for temporary absences when he followed his pursuit as a seaman. The last entry was at Norfolk, Virginia on November 22, 1947, where he sought admission

as a resident alien seaman returning to the United States. This Court stated in part, as follows:

"It is apparent that when the appellee, on March 22, 1935, and again on April 6, 1935, made his way into the continental United States, whether as a stowaway or otherwise, he did so in violation of the section last quoted. Under the rule commonly applied to unlawful entries into the United States by aliens generally, appellee could not have established a domicile in the continental United States or acquired a lawful permanent residence there. (Citing cases.)"

The lower court was reversed upon other grounds, namely that Varleta had qualified for entry into this country under the Philippine Trade Act (Title 22, U.S.C.A., Section 1281). Clearly, the act with which the Varleta case was concerned is not involved here since Banez did not actually reside in the United States for a continuous period of three years during the period of forty-two months ending November 30, 1941, having originally entered only on May 4, 1939; and because his entry on March 6, 1946 was not within the period from July 4, 1946 to July 3, 1951.

ARGUMENT

II.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANT ILLEGALLY ENTERED THE CONTINENTAL UNITED STATES IN 1939 AND AT NO TIME WAS HIS SUBSEQUENT PRESENCE IN THIS COUNTRY LEGAL.

Appellant came to the continental United States as a stowaway on May 4, 1939 (R-30 —stated incorrectly as May 4, 1949) ; and he remained in the United States until December, 1945, when he signed aboard a United States hospital ship which went to the Philippine Islands and returned to the continental United States at San Francisco on March 6, 1946. (R-30). Opposing counsel recognizes that the only questions for the Court to consider is whether or not a visa was required for Banez' entry into the United States during said period and whether or not there were in fact entries made in 1939 and again in 1946. (R-30). The matter of the requirement of a visa has been heretofore covered and the question as to what constitutes an entry will now be considered.

To the question as to what constitutes an entry there is cited for the Court's consideration the case of *United States ex rel Pellegrino v. Karnuth, District Director, Immigration & Naturalization Service*, 23 F. Supp. 688, 689 (D.C.W.D.-NY, 1938) where the Court stated in part as follows:

“The word ‘entry’, as used in the statute, includes any coming into this country of an alien from a foreign country, whether it be a re-entry upon a permit or otherwise. (Citing cases).”

See also *Del Castillo v. Carr*, etc., 100 F.2d 338, 340 (C.A. 9, 1938); *United States ex rel Doukas v. Wiley, et al.*, 160 F.2d 92, 95 (C.A. 7, 1947); *Barber v. Varleta*, *supra*; *Volpe v. Smith*, 289 U. S. 422.

The subsequently enacted McCarran Act, Title 8, U.S.-C.A., Sec. 1101 (13), defines the term “entry”, which is merely a restatement of what the cases had previously held. Counsel will no doubt argue that the entry on February 22, 1946, in the Hawaiian Islands and in San Francisco on March 6, 1946, was but a continuous sequence in the original entry because Banez was on a United States vessel from the beginning to the end of his voyage, commencing in December, 1945. In this connection counsel has cited the case of *In Re Moncan*, 14 F. 44, as authority for this proposition:

“A person on board a vessel of the United States . . . is in contemplation of law within the jurisdiction of the United States and is entitled to remain here.”

In the first place in connection with the foregoing argument, Banez is deportable on the basis of either the 1939 or the 1946 entry, as will be pointed out hereafter. Secondly, the *Moncan* case was concerned solely with the Act of May 6, 1882, relating to the coming of Chinese laborers to the

United States. Third, there clearly has been an "entry" into the United States within the meaning of the immigration laws when there has been an arrival from a foreign port or place. *U. S. ex rel Stapf v. Corsi*, 287 U.S. 129; *U. S. ex rel Claussen v. Day*, 279 U.S. 398. Fourth, the Philippine Islands were "foreign" for immigration purposes at the time here in question *Barber v. Gonzales*, *supra*. Fifth, a seaman has made an "entry" following return from a round-trip voyage to a foreign port or place, even though he did not go ashore or the vessel was of United States' registry. *U. S. ex rel Roovers v. Kessler*, 90 F.2d 327 (C.A. 5, 1937) *U. S. ex rel Trompetto v. Corsi*, 61 F. 2d 856 (C.A. 2, 1932); *U. S. ex rel Stapf v. Corsi*, *supra*; and *U. S. ex rel Claussen v. Day*, *supra*.

ARGUMENT

III.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANT WAS DEPORTABLE UNDER THE WARRANT OF DEPORTATION BASED UPON HIS ILLEGAL ENTRY INTO THE UNITED STATES ON MAY 4, 1939.

Although Banez originally was arrested on an improper entry in 1946, it was not unlawful to order his deportation for an irregular entry in 1939, upon the basis of evidence developed at the hearing, provided the hearing was fairly conducted. As to the appellant being fully informed of the charges made against him, the District Judge below in his

opinion dated December 7, 1955, commented in part as follows:

"Petitioner was at all times aware of the nature of the charges made against him, and the findings of the examiner, made November 24, 1952, were amply supported by the evidence and referred to both entries."

It is well settled that irregularities in a Warrant of Arrest if any, or in other preliminaries do not invalidate the proceedings, if valid grounds for deportation were properly established before the final expulsion order was made. *Bilokumsky v. Tod*, 263 U. S. 149 (1923). It has been common practice for many years to revise or supplement the charges mentioned in the Warrant of Arrest. An order of deportation resting on such amended charges is unassailable, provided the appellant was given adequate notice of such charges and opportunity to refute them. *Catalano v. Shaughnessy*, 197 F.2d 65 (C.A., 2, 1952) *Tadano v. Manney*, 160 F.2d 665 (C.A. 9, 1947). On the question of appellant's deportability the hearing officer merely applied the statute to undisputed facts. *Marcello v. Bonds*, *supra*. The facts were freely and voluntarily admitted by appellant and his counsel at the hearing. The issues were clearly understood at the hearing before the examiner and before the court below.

ARGUMENT

IV.

THE WARRANT OF ARREST WAS NOT INVALIDATED BY ANY STATEMENT OF GOVERNMENT COUNSEL AT THE HEARING OF THIS CAUSE BEFORE THE DISTRICT COURT BELOW.

The District Judge was correct in determining that the Warrant of Arrest was "broad enough to include his original entry in 1939"; that the findings of the examiner were supported by the warrant and referred to both entries; that the examiner's findings that Banez is deportable on the basis of either entry was affirmed by the Board of Immigration Appeals; and that the Warrant of Deportation being based on the 1939 entry created no variance between the original Warrant of Arrest and the Warrant of Deportation.

Clearly, Banez was deportable on either his 1939 or 1946 entry. The Warrant of Deportation is broad enough to embrace either entry and while, at the hearing government counsel, in answer to the court's question, ventured his opinion that the 1946 entry was not involved, and it was not intended to waive any material grounds for deportation that were available to the government.

ARGUMENT

V.

SECTION 8(a) OF THE ACT OF MARCH 24, 1934, 48 STAT. 462, WAS NOT REPEALED OR MODIFIED BY SECTION 2 OF THE ACT OF AUGUST 7, 1939, 53 STAT. (PART 2) 1230.

Section 2 of the Act of August 7, 1939, 53 Stat. (Part 2) 1230, amended Section 8 of the Act of March 24, 1934, 48 Stat. 462, by adding the following new subdivision:

“(d) Pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands, except as otherwise provided by this Act, citizens and corporations of the Philippine Islands shall enjoy in the United States and all places subject to its jurisdiction all of the rights and privileges which they respectively shall have enjoyed therein under the laws of the United States in force at the time of the inauguration of the Government of the Commonwealth of the Philippine Islands.”

The 1939 act has no relevance for a number of reasons. First, it became effective after appellant's entry in 1939 and therefore did not, under its terms or intention, correct the impropriety of the previous entry. Second, it does not purport to repeal or modify subsection (a) of Section 8, which imposed the applicable requirements for compliance with the immigration laws. Thus, the privileges which Philippine citizens were to enjoy under its terms obviously did not include

subsection (a)'s requirement that a visa was to be presented by Filipinos seeking entry from a foreign country. It will be further noted that the 1939 act added a new subdivision designated as sub-paragraph (d). On page 7 of appellant's brief, undoubtedly through inadvertance in quoting the above section, counsel designated it as paragraph (a), whereas reference to the statute will show that Congress designated it as (d). It is obviously clear therefore that the 1939 act was to follow the sub-paragraphs (a), (b) and (c), all under section 8 of the Act of March 24, 1934.

Further in this connection it is our view that the Philippine Independence Act of 1934 was a formal Congressional expression of the firm purpose of the people of the United States, held from the Cession of the Philippine Islands through this country by Spain, to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government could be established therein. Unmistakably, in enacting that legislation, Congress was mindful of the anomalous status of natives and citizens of the Philippine Islands pending that nation becoming completely independent. Obviously Section 8(a) (1) of that act was intended by Congress to be a clarification of this peculiar situation.

ARGUMENT

VI.

THE HEARING BEFORE THE IMMIGRATION HEARING OFFICER ON NOVEMBER 10, 1952 WAS NOT UNFAIR.

Under certain circumstances a hearing may be adjudged to be unfair if witnesses' statements are introduced into the record that are detrimental to appellant's defense and when said witnesses are available but are not called by the government to testify in person and be subject to cross-examination.

On page 16 of the report of the immigration hearing of November 10, 1952, appellant's counsel objected to the introduction of Exhibit 14, which objection was based on the fact that the witnesses whose statements were narrated in the report of Investigator Peter Szambelan, were not present at the hearing and subject to cross examination. On the same page of the report counsel stated "I object for the record only". As pointed out in said report by the hearing officer, the witnesses' statements as narrated embodied only favorable comment regarding petitioner-appellant and therefore no reason existed for cross-examination of said witnesses. Counsel's only apparent objection was that one of the witnesses interrogated by the investigator was presumably a communist and therefore his statements could not be relied upon, and that in a case of another person interrogated it became apparant evidently that the witness was mistaken

as to some dates and as to whether or not he had been properly sworn before a notary public in the execution of some statement. The record is devoid of any showing that the statement made by the investigating officer which narrated the interview with the two witnesses was ever considered by the hearing officer. Further it appears very clear that failure to produce these two persons for cross-examination was entirely harmless. At the hearing the evidence upon which the findings by the hearing officer was based was voluntarily and freely furnished by appellant or by admissions made by his counsel. The hearing officer was not required to go beyond these admissions for reasonable, substantial and probative evidence to support his findings and to support the resultant warrant eventually issued.

An alien, in deportation proceedings, must be afforded due process of law, including a fair hearing. *Navarrette-Navarrette v. Landon*, 223 F.2d 234, 237 (C.A. 9, 1955). A reading of the report of the hearing held before the hearing officer on November 10, 1952 will clearly demonstrate that appellant was afforded a fair and impartial hearing and in accordance with due process of law.

ARGUMENT

VII.

THE REFUSAL OF THE IMMIGRATION AND NATURALIZATION SERVICE TO GRANT BANEZ A SUSPENSION OF DEPORTATION WAS NOT AN ABUSE OF DISCRETION.

The last and final issue presented by appellant in this case relates to the question of discretionary relief. The hearing officer has denied such relief as a matter of administrative discretion, but counsel contends that said hearing officer was arbitrary and abused his discretion and contends that the factors presented by this case are essentially such as to merit for the respondent a suspension of deportation under the provisions of Section 19, (c) (2) (b) of the Immigration Act of 1917, as amended.

The hearing officer in his report pointed out that the appellant having resided in the United States in excess of seven years was eligible for suspension of deportation. While the record appears to show that this appellant was law abiding, was industrious and had other favorable characteristics, there was no showing made on his behalf that would entitle him to preferential treatment over other good people desiring to come to the United States.

The law is abundantly clear that the exercise of discretion as exercised by the Immigration and Naturalization Service

will not be reviewed by the courts, *U. S. ex rel Adel v. Shaughnessy*, 183 F.2d 371 (2nd Cir. 1950,) or a failure to exercise discretion. *U.S. ex rel Kaloudis v. Shaughnessy*, 180 F.2d 489, (2d Cir. 1950); *U.S. ex rel Weddeke v. Watkins*, 166 F.2d 369, 373, (2d Cir., 1948), Cert. den. 333 U.S. 876; and it was not for the courts on pass on the factors relied on by the hearing officer or the Board of Immigration Appeals in reaching their decision. *Marcello v. Bonds, supra*.

The record in this case does not substantiate either a clear abuse of discretion or a failure to exercise discretion. Counsel does not cite a single case in support of his claim that the hearing officer abused his discretion for failure to suspend deportation of appellant and we submit that legally and factually this exception is without merit.

* * * *

Cases referred to by counsel are not in point. They fall generally into categories where entries were made prior to the Philippine Independence Act; cases where persons against whom deportation proceedings were instituted had made prior, valid entries into the U. S.; cases where hearings were determined to be unfair, where material witnesses were available and not called to testify at the hearings although requested to do so, in which cases detrimental statements were put into evidence over objection; and cases where

statements were introduced, over objection, containing hearsay on hearsay and based on confidential information related to the Immigration Officer not disclosed to the appellant.

CONCLUSION

The decision of the District Court is correct and should be affirmed by this Court.

Respectfully submitted,

C. E. LUCKEY

*United States Attorney
District of Oregon*

VICTOR E. HARR,

Assistant United States Attorney

Attorneys for Appellee,

Roy J. Norene

APPENDIX A

WARRANT
FOR ARREST OF ALIENUNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
Seattle, Washington

No. 1209-5446

To OFFICER IN CHARGE, IMMIGRATION AND
NATURALIZATION SERVICE, Portland, OregonOr to any Immigrant Inspector in the service of the United
States.WHEREAS, from evidence submitted to me, it appears
that the alien

ROQUE MADRONA BANEZ, alias R. MONTING
who entered this country at Honolulu, Hawaii, on about the
12th day of February, 1946, has been found in the United
States in violation of the immigration laws thereof, and is
subject to be taken into custody and deported pursuant to the
following provisions of law, and for the following reasons,
to wit: The Immigration Act of May 26, 1924, in that, at the
time of entry, he was an immigrant not in possession of a
valid immigration visa and not exempted from the presenta-
tion thereof by said Act or regulations made thereunder; and
and The Passport Act approved May 22, 1918, as amended,
and the Act of Feb. 5, 1917, in that, at the time of entry, he
did not present an unexpired passport or official document
in the nature of a passport issued by the government of the

country to which he owes allegiance or other travel document showing his origin and identity, as required by Executive Order in effect at time of entry.

APPENDIX B

FINDINGS OF FACT: Upon the basis of all the evidence presented, it is found:

- (1) That the respondent is an alien, a native and citizen of the Philippine Islands;
- (2) That the respondent last entered the United States at Honolulu, T. H., on February 22, 1946, on the American S. S. "Louis A. Milne";
- (3) That the respondent at the time of such arrival was returning to an unlawful residence in the United States which originated on May 4, 1939, on which date he arrived as a stowaway;
- (4) That the respondent at the time of his last entry was not in possession of a valid immigration visa;
- (5) That the respondent at the time of his last arrival was not in possession of a valid passport or other travel document in lieu thereof but shortly thereafter obtained a certificate of identity and was permitted to leave the vessel on which he arrived.

CONCLUSIONS OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

- (1) That under Sections 13 and 14 of the Immigration Act of May 26, 1924, the respondent is subject to deportation on the ground that at the time of his

last entry he was not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder;

- (2) That under Section 19(a) of the Immigration Act of February 5, 1917, as amended, the respondent IS NOT subject to deportation on the ground that at the time of his last entry he entered in violation of the Passport Act approved May 22, 1918, in that he did not present an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity, as required by Executive Order in effect at time of such entry.

ORDER; It is ordered that the respondent be deported from the United States pursuant to law on the following charge:

The Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

APPENDIX C

ORDER: It is ordered that the outstanding order of deportation be withdrawn and the alien be permitted to depart from the United States voluntarily without expense to the government, to any country of his choice, within such period of time, in any event not less than 30 days, and under such conditions as the officer-in-charge of the District deems appropriate, conditioned upon consent of surety, if any.

APPENDIX D

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

WARRANT OF DEPORTATION

TO: CHIEF, DETENTION, DEPORTATION AND
PAROLE SECTION, IMMIGRATION AND
NATURALIZATION SERVICE, Seattle, Wash-
ington

Or to any Officer or Employee of the United States Im-
migration and Naturalization Service.

WHEREAS, after due hearing before an authorized of-
ficer of the United States Immigration and Naturalization
Service, and upon the basis thereof, an order has been duly
made that the alien ROQUE MADRONA BANEZ alias R.
MONTING who entered the United States at Portland,
Oregon on the 4th day of May, 1939, is subject to deportation
under the following provisions of the laws of the United
States, to wit: The Immigration Act of May 26, 1924, in that
at the time of entry, he was an immigrant not in possession
of a valid immigration visa and not exempted from the pre-
sentation thereof by said Act or regulations made thereunder.

No. 15,002

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WONG GONG FAY,

Appellant,

VS.

HERBERT W. BROWNELL, JR., Attorney
General of the United States,

Appellee.

APPELLEE'S REPLY BRIEF.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

422 Post Office Building,

Seventh and Mission Streets,

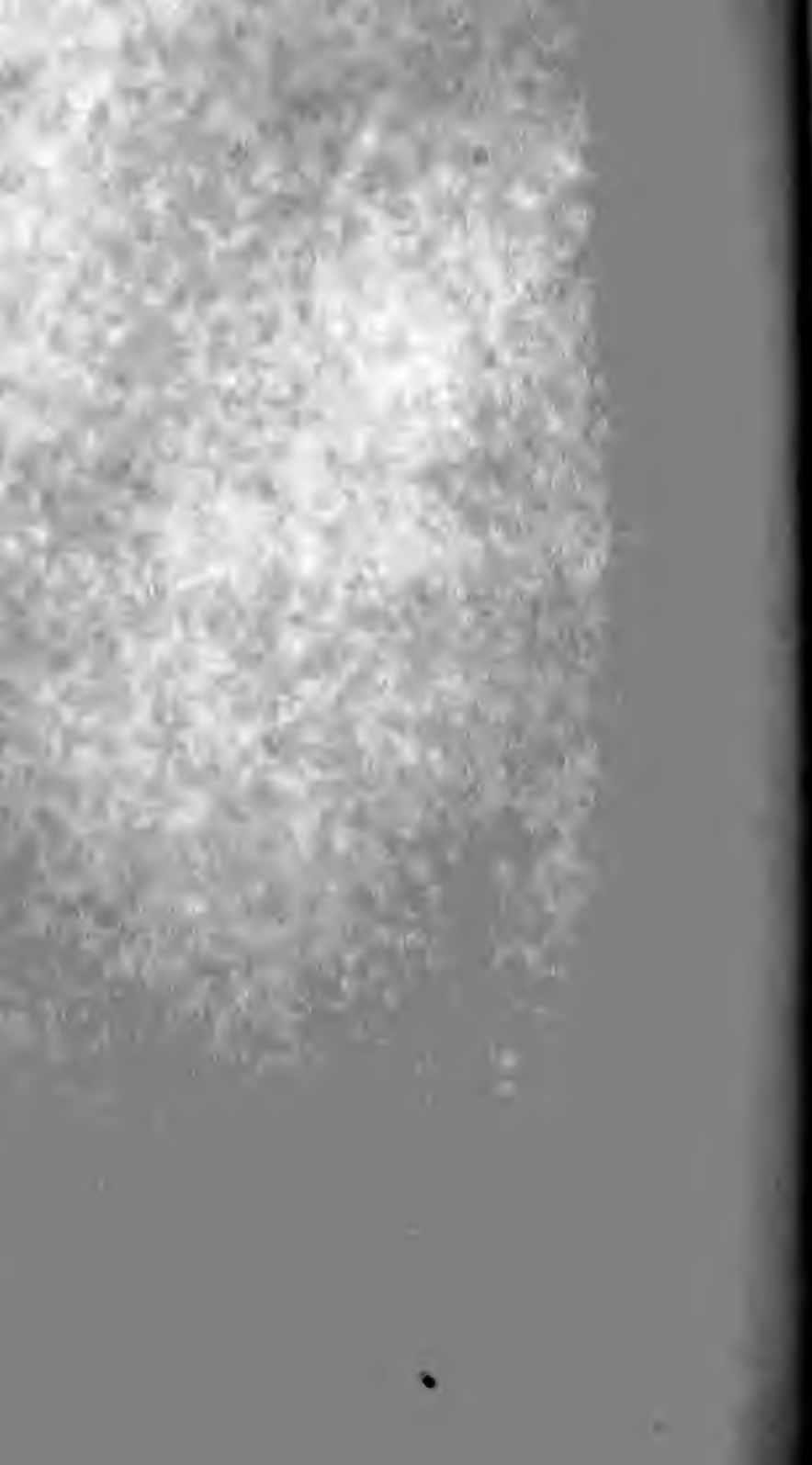
San Francisco 1, California,

Attorneys for Appellee.

FILED

JUN 26 1956

PAUL P. O'BRIEN, CLERK



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No. 15,002

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WONG GONG FAY,

Appellant,

VS.

HERBERT W. BROWNELL, JR., Attorney
General of the United States,

Appellee.

APPELLEE'S REPLY BRIEF.

STATEMENT OF THE CASE.

There was a previous appeal by appellant in this case, No. 13,970. The opinion was filed on July 20, 1955 and is to be found at 224 F. 2d 717. The case was tried before the Honorable Michael J. Roche in the United States District Court for the Northern District of California. Judgment was rendered for the defendant, the appellee herein. The appeal from the judgment was heard by this Court subsequent to the decisions in the cases of *Ly Shew v. Dulles*, 219 F. 2d 413, and *Chow Sing v. Brownell*, 217 F. 2d 140. This Court looked to the finding of fact of the trial court that appellant had "failed to introduce evidence of sufficient clarity to satisfy and convince

this court . . .” and found that it was identical (save and except for the name of the appellant) with the findings made in *Ly Shew* and *Chow Sing*, and because of the similarity of the language, this Court was persuaded that the District Court had applied the standard of proof held to be improper in said *Ly Shew* and *Chow Sing* cases, and “on the authority of *Ly Shew* and *Chow Sing*” the judgment is vacated and the cause remanded with directions to make findings as to whether Wong Hai is the father of Wong Gong Fay, such findings to be made in the light of the decisions of this Court, *supra* (*Ly Shew* and *Chow Sing*) and thereupon enter such judgment as may be proper.”

Following the return of the mandate appellant lodged findings of fact and conclusions of law and a document entitled “Amended Judgment of Nationality.” In opposition thereto the findings of fact and conclusions of law and the judgment contained in the transcript of record herein at pages 3 and 6 were lodged by appellee. The findings of fact and conclusions of law as signed by the judge recited the directions of the mandate of this Court and specifically said that “at the conclusion of this case on May 8, 1953 I found that based upon the ordinary burden of proof resting on plaintiffs in civil actions, plaintiff Wong Gong Fay was not entitled to the relief prayed for. I have continuously adhered to that view. The judgment and findings of fact originally entered in this case were based upon the ordinary burden of proof resting on plaintiffs in civil actions.”

QUESTION PRESENTED.

The typewritten transcript on the above appeal does not contain a statement of the points upon which appellant intends to rely on his appeal. Appellant's brief (page 4) claims adherence to the following points:

- (1) The Court erred in reversing the opinion of the Court of Appeals.
- (2) The Court erred in finding that the correct rule of law was applied regardless of the use of language "convincing and satisfying," etc., with respect to evidence.
- (3) The Court erred in making new findings which were contrary to the testimony as evidenced in the record.
- (4) The Court erred in making a new finding that was arbitrary and prejudicial to the rights of appellant.

Although not stated as such, it appears that the only issue raised by appellant is that the judgment of the lower court is "clearly erroneous".

SUMMARY OF ARGUMENT.

Appellant has failed to establish by credible evidence that he is the son of a citizen of the United States and therefore entitled to admission to the United States as a derivative citizen by virtue of Section 1993 of the Revised Statutes.

showing of unreasonable or incredible testimony having been offered by both the father, Wong Hie, and the son, Wong Gong Fay.”

Persons who claimed to be Wong Gong Fay and Wong Hai (Wong Hie, Wong Hu) testified. Wong Hai claimed to have been born in the United States on February 26 or 28, 1901; he claimed to have lived in the United States over 50 years but could not speak enough English to testify without an interpreter. He claimed to have departed the United States for China December 17, 1924, and to have returned on December 15, 1926. He claimed he was married, Chinese Republic 12th year First Month, Tenth Day, which translates to February 2, 1925. His Chinese calendar birthday was KS 27th Year, First Month, Tenth Day.

He claimed a child was born on CR 16th Year, Fourth Month, Eighth Day, United States calendar May 15, 1926. Assuming a child was born as claimed, he would have been not more than six months old when Wong Hai departed China. This child was not seen again in China by Wong Hai. In 1951 a person claiming to be Wong Gong Fay arrived in the United States. There is no evidence to indicate how or on what basis Wong Hie or Wong Gong Fay could have identified each other.

(a) Appellee does not believe Wong Hie was born in the United States. His testimony as to his father, mother, four brothers and sister is most obscure. He had not seen or heard from his mother since 1924.

He had no knowledge of the whereabouts of his brother or sister—in fact has not seen any of them since he returned from China in 1926. His father died in 1914 (Tr. p. 50). His remains were sent to China (Tr. p. 51) by his brother (Tr. p. 51), by his mother (Tr. p. 52), and by a distant relative or cousin (Tr. p. 52).

(b) The school report cards were introduced as Exhibits 2, 3, 4, 5 and 6. Wong Hai claimed that the report cards were sent to him from China. “These were sent to me individually year after year while the boy was attending school.” (Printed Tr. p. 46). On page 75 of the printed transcript he testified:

Q. (By Mr. Collett) When did you come into possession of this document?

A. It has been a long time ago. I cannot remember now.

Q. How long ago?

A. He finished school quite some time ago. I cannot remember exactly what year that was. I do not remember.

Q. Did you have this in 1951?

A. The Interpreter: Forty what?

Mr. Collett: 1951.

A. 1951. That must be about—maybe about that time that he sent me.

Q. Well, do you remember whether or not you had it in 1951?

A. About that time, I can't remember exactly.

Q. How did you receive it?

(Page 76):

A. The Immigration Officer told me to get those report cards in order to present them as

evidence and in the aid to that I wrote home and sent for them.

Q. Oh, you wrote to whom?

A. I wrote home to my wife, told her to find those documents.

Q. Did she send it to you?

A. Yes.

Q. In the letter?

A. Yes.

Q. Do you have the letter?

A. No, the report cards were sent to me without any letter.

Q. Do you have the envelope?

A. I don't know where I placed them now.

Q. Did you ever show this document to the Immigration officials?

A. No, I didn't.

Q. Why not?

A. They didn't ask me.

Q. You stated that they asked you to get it?

A. They asked for it, but I didn't have it. How can I present it when I don't have it?

Q. Why didn't you present it after you got it?

A. I don't know whether I was supposed to submit them. I just turned them over to my attorney.

Q. When?

A. I cannot remember now.

Q. How soon after the Immigration said to you to get the so-called reports did you receive these documents?

A. A few months.

Q. What year was it?

A. 1951.

Q. This Exhibit 3 has the date of August 10, 1944. You did not receive it in 1944, that's correct, isn't it?

(Page 77):

Mr. Fusco: Your Honor, I object to that. Plaintiff has already answered that question and has already stated that——

The Court: What question?

Mr. Fusco: That they were all received after 1951.

Mr. Collett: No, no, he hasn't stated anything like that.

The Court: Proceed.

Q. (By Mr. Collett) Plaintiff's Exhibit 3, do you understand what I mean by Plaintiff's Exhibit 3?

The Court: Show it to him and ask him if he ever saw it before.

Mr. Collett: He has testified, if the Court please——

Q. (By Mr. Collett) You did not receive this document which is entitled Plaintiff's Exhibit 3 in August, 1944?

A. NO.

Q. You said you received it in 1951?

A. Yes.

Q. Referring now to Plaintiff's Exhibit 4, when did you receive this?

A. It was not sent to me individually. It was sent all together at one time in 1951.

(After short recess):

(Page 78):

Q. (By Mr. Collett) It is your testimony that these documents which have been identified as Plaintiff's 3, 4, 5 and 6, these school reports, were all received at the same time, is that correct?

A. Yes.

Q. And you say that that was some time in 1951?

A. About that time. I cannot quite remember now.

Q. At no time were they shown to the officials of Immigration?

A. No.

Q. You told us this morning that you had received them individually year after year while the boy was attending school. That isn't true, is it?

A. Not year after year. They were all sent to me at one time.

Q. Well, you told us this morning that they were received year after year.

A. I didn't say that. I said it was sent to me at one time.

Q. Was that your recollection of your testimony this morning?

A. I think that is what I said this morning, that I think they were sent all together to me.

Q. The truth is, they were not received one at a time individually while the boy was at school, that is not true, is it?

A. I didn't say that those were sent to me individually one by one each year.

Q. Well, it is not true they were received one by one each year?

A. Yes.

Q. Did they all come to you in the same envelope?

A. Yes.

(Page 79):

Q. Are you sure that you received them from China?

A. Yes.

Q. You don't have the envelope in which they were sent to you?

A. I don't have it now.

(c) Plaintiff's Exhibit 7—Income Tax Returns for 1942 and 1943. These income tax returns were produced in support of the claim of dependency. Deductions were claimed in each year 1942 and 1943 but Wong Hai readily admitted he did not send any money and he wasn't able to on account of the war (Printed Tr. 73). He claimed a deduction of \$1155 for dependents in 1943 but stated "I could not send any money home."

(d) Testimony of Wong Gong Fay, or rather the person who claims to be Wong Gong Fay, shows that almost immediately after his release from detention by the Immigration and Naturalization Service he went to Sacramento where he worked, slept, ate, lived, at a laundry operated by the Chin family, continuously thereafter (Printed Tr. pp. 96 to 99).

The record in this case is devoid of any evidence connecting the two persons, the alleged Wong Gong Fay and Wong Hai, as father and son. The absence of association between these two persons following the arrival of Wong Gong Fay in the United States further indicates a complete absence of relationship.

The burden of proof was upon the appellant to establish his claims.

Bauer v. Clark, (CA-7) 161 F. 2d 397;

Mar Gong v. Brownell, (CA-9) 209 F. 2d 448;

Elias v. Dulles, (CA-1) 211 F. 2d 520;

Brownell v. Lee Mon Hong, (CA-9) 217 F. 2d 143;
Chow Sing v. Brownell, (CA-9) 217 F. 2d 140;
Law Don Shew v. Dulles, (CA-9) 217 F. 2d 146;
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Wong Ken Foon v. Brownell, (CA-9) 218 F. 2d 444;
Lew Wah Fook v. Brownell, (CA-9) 218 F. 2d 924;
Lue Chow Kon v. Brownell, (CA-2) 220 F. 2d 187;
United States ex rel. Dong Wing Ott v. Shaughnessy, (CA-2) 220 F. 2d 537;
Lee Dong Sep v. Dulles, (CA-2) 220 F. 2d 264;
Ng Kwock Gee v. Dulles, (CA-9) 221 F. 2d 942.

The credibility of a witness is a matter exclusively for the determination of the trial court.

Chow Sing v. Brownell, (CA-9) 217 F. 2d 140;
Mar Gong v. Brownell, (CA-9) 209 F. 2d 448;
Law Don Shew v. Dulles, (CA-9) 217 F. 2d 146;
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Lee Dong Sep v. Dulles, (CA-2) 220 F. 2d 264;
Lue Chow Kon v. Brownell, (CA-2) 220 F. 2d 187;
Ng Kwock Gee v. Dulles, (CA-9) 221 F. 2d 942;
Wong Ken Foon v. Brownell, (CA-9) 218 F. 2d 444.

The mere say-so of interested witnesses, even though uncontradicted, does not have to be accepted.

Quock Ting v. United States, 140 U.S. 417;

Chin Yow v. United States, 208 U.S. 8;

Marcella v. C.I.R., (CA-8) 222 F. 2d 878, 883;

Purcell v. Waterman SS. Co., (CA-2) 221 F. 2d 953;

Tam Dock Lung v. Dulles, (CA-9) 218 F. 2d 586;

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Noland v. Buffalo Ins. Co., (CA-8) 181 F. 2d 735, 738;

Heath v. Helmick, (CA-9) 173 F. 2d 157, 161;

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Lee Sing Far v. United States, 94 F. 834.

CONCLUSION.

The record fully supports the findings of fact and conclusions of law and the judgment of the court below. The judgment is not clearly erroneous and should be affirmed.

Dated, San Francisco, California,
June 15, 1956.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

No. 15003

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 12, AFL,
Respondent.

Transcript of Record

Petition for Enforcement of an Order of The National Labor
Relations Board

FILED

APR - 2 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Case No. 21-CB-564

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 12, AFL, and
ROBERT A. HOLDERBY, An Individual.

Case No. 21-CB-536

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 12, AFL, and
FREDERICK R. HUMMEL, An Individual.¹

Case No. 21-CB-586

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 12, AFL, and
HOYT COVERT, An Individual.

INTERMEDIATE REPORT

Dan Grodsky, Esq., for the General Counsel.

Robert A. Holderby, of Los Angeles, California,
pro se.

David Sokol, Esq., and Mr. H. M. McNeel, of Los
Angeles, California, for the Respondent.

Before: Thomas S. Wilson, Trial Examiner.

Statement of the Case

Upon charges duly filed by Frederick R. Hummel
on November 16, 1953; by Robert A. Holderby on

¹ As Hummel did not appear as a witness and as
no evidence was presented on his behalf, the under-
signed will recommend that this complaint be dis-
missed as to him.

February 15, 1954; and by Hoyt Covert on April 8, 1954, the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-first Region (Los Angeles, California), issued a complaint against International Union of Operating Engineers, Local No. 12, AFL, herein called the Respondent, or Local 12, alleging that the Respondent was engaged in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2), of the Act and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charges, consolidated complaint, amendment to the consolidated complaint and notice of hearing were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleged, in substance, that: (1) the Respondent was operating a hiring hall in a manner discriminatory to nonmembers of the Respondent; (2) Respondent had discriminatorially refused to dispatch one Robert A. Holderby because of his nonmembership in the Respondent; and (3) the Respondent, by the acts of its agent Smallwood, attempted to cause an employer, United Concrete Pipe Corporation, to discriminate against an employee, Hoyt Covert, all in violation of Section 8 (b) (1) (A) and (2) and Section 2 (6) and (7) of the Act. By its answers duly filed, Respondent denied the commission of any unfair labor practice.

Pursuant to notice, a hearing was held at Los Angeles, California, on October 18-19, 1954, before

the undersigned, at which hearing the General Counsel, the Respondent and Holderby were represented by counsel or in person. Full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing upon the issues, and to present oral argument and briefs was afforded all parties. On November 10, 1954, the General Counsel and the Respondent filed briefs.

From observation of the witnesses, and upon the entire record in the case, the undersigned makes the following:

Findings of Fact

I. The business of the Companies

The complaint alleged, and the answer denied, that:

2. The Associated General Contractors of America,² herein called the Association, is composed of building and construction contractors, herein called its members, located in, and doing business in all states of the United States, and exists in part to negotiate contracts with and conduct labor relations for its members with labor organizations, including Respondent.

3. The aggregate business of members of the Association exceeds \$100,000,000 annually, and includes work on manufacturing and industrial structures and national defense installations valued in excess of \$100,000,000 annually. Members of the Association annually perform services outside the

² Referred to herein as AGC or Association.

state wherein their individual primary operations are located valued at in excess of \$50,000,000.

To prove these allegations the parties stipulated that the testimony of William E. Coombes given in Case No. 21-CB-548 be considered a part of the record in the instant case.

The stipulated testimony showed that Ford J. Twaits Company was in 1953 and 1954 a member of the Associated General Contractors and was the sponsor of a joint venture with Morrison-Knudsen Company, Inc., and Macco Corporation which was awarded some six contracts for several million dollars' worth of construction at a Marine training base at Twenty-Nine Palms, California, for the United States Navy. This testimony also showed that Ford J. Twaits Company and Morrison-Knudsen Company, Inc., also performed work at Nellis Air Force Base near Las Vegas, Nevada, which when completed would amount to between ten and eleven million dollars. This testimony further indicated that Morrison-Knudsen Company, Inc., was also engaged on an airport construction job near New Orleans, Louisiana, and that it was "generally well known in the trade that Morrison-Knudsen Company is one of the largest construction companies in the world and they are doing business in practically every state, if not all the states from time to time."

Although there is neither allegation nor proof that a single dollar's worth of goods or materials crossed State lines for any of the above projects,

two of the projects apparently concern the defense of the country and are in a sum in excess of the \$100,000 now required by the Board's new jurisdictional standards so that therefore, under these standards, AGC is engaged in commerce within the meaning of the Act.

By amendment dated August 11, 1954, the General Counsel added paragraph 12 (a) to his complaint which read as follows:

The Respondent, by the acts of its agent Smallwood, at a date not certain but believed to be late in February or early in March, 1954, attempted to cause an employer, United Concrete Pipe Corporation, to discriminate against an employee, Hoyt Covert, in violation of Section 8(a) (3).

There is no allegation in the complaint nor proof in the testimony that United Concrete Pipe Corporation was either individually engaged in commerce or was a member of the Associated General Contractors. The undersigned must, therefore, find that said Employer was not engaged in commerce within the meaning of Section 2 (6) and (7) of the Act. Although the unfair labor practice alleged was otherwise clearly proven in the actions of agent Smallwood, the evidence proves that this was a single, isolated incident, and that it would not effectuate the policies of the Act to issue a cease and desist order on this alone. With the above caveat, the undersigned will recommend that the complaint be dismissed as regards to employee Hoyt Covert.

II. The Respondent

International Union of Operating Engineers, Local No. 12, AFL, is a labor organization admitting to membership employees of the members of the Associated General Contractors.

III. The alleged unfair labor practices

1. The Hiring Hall.

In the complaint, the evidence and during oral argument the General Counsel appeared to be contending that the entire hiring hall procedure set up by the Respondent in accordance with the terms of its contract with AGC was illegal but in his brief the General Counsel states: "The General Counsel is not attacking the agreement under which the Respondent's hiring hall has been set up. The attack is solely centered upon the operation of the hiring hall." At the conclusion of the testimony the undersigned expressed bewilderment as to the theory upon which the General Counsel was proceeding in this matter. The concession above has not removed that bewilderment.

The agreement in effect between the Respondent and AGC at all times material here, and with some minor changes still in effect in the current contract between the two, provided as follows regarding the hiring of employees:

II.

A. That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective bargaining representative of all employees of the Contractors signatory hereto over

whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor as of the date of this Agreement. * * *

That subject to this understanding the Contractors shall have entire freedom of selectivity in hiring and may discharge any employee for any cause which he may deem sufficient, provided there shall be no discrimination on the part of the Contractors against an employee, nor shall any such employee be discharged by reason of any Union activity nor interfering with the proper performance of this work.

It is the intention of the parties that all workmen covered hereby shall be or become forthwith upon employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and on whose behalf this Agreement is executed, as a condition of employment, and that this provision shall become operative without further notice or amendment whenever amendments to or judicial interpretations of the Labor-Management Relations Act of 1947 remove the inhibitions against the application of this paragraph now existing under the present wording and judicial interpretations of that Act.

It is agreed that all workmen covered hereby shall be or become, not more than thirty (30) days after employment and remain continuously, members in good standing of the International Unions

signatory hereto through their affiliated Local Unions having work and area jurisdiction and on whose behalf this Agreement is executed, and shall remain available for work as a condition of employment.

B. That in the employment of workmen for all work covered by this Agreement in the territory above described, the following provisions, subject to the conditions of Article II-A, above, shall govern:

1. That the Local Unions shall establish and maintain open and nondiscriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local Union of each particular trade.

That the Contractors shall first call upon the respective Local Unions having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local Unions, or their Agents, shall immediately furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors.

That the respective Local Unions, or their Agents, will furnish each such required competent workmen or skilled mechanic entered on their lists, to the Contractors by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local Unions' listing in the following manner:

(a) Workmen who have been recently laid off or terminated in that respective Local Union's work

and area jurisdiction by the Contractors now desiring to re-employ the same workmen in that same area provided they are available for employment.

(b) Workmen who have been employed by Contractors in the respective Local Union's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the respective Local Union having work and area jurisdiction and who are available for employment.

* * * * *

That workmen employed by the Contractors for a period of thirty (30) days continuously or accumulatively within the multiple-employer unit and procured in accordance with II, B-1, (c), above or procured full other sources by the Contractors themselves, shall become members of the appropriate craft Union signatory hereto immediately upon terms and qualifications not more burdensome than those applicable at such times to other applicants to such Union.

Based upon this contract the Respondent established a hiring hall procedure in order to supply the manpower requirements of various members of AGC who would telephone those requests into the Union as they arose. These telephone calls are taken by secretaries in the Union's dispatcher's office. Upon receipt of such requests these secretaries refer to the Union's out-of-work rolls and from

those rolls secure a man with the qualifications requested and dispatch him with a union referral paper to the requesting contractor.⁵ During the times material here, these out-of-work lists were made up weekly in the union office and consisted of two groupings respectively headed "Members" and "Transfers and Others." Listed under the heading of "Members" were those members of Local 12 who had reported by telephone or otherwise that they were out of employment and seeking work. Under the other heading were listed union members from other locals who had transferred into the jurisdictional area of Local 12 and any other workman who reported himself at the union office and filled out an information card giving the usual employment data, to wit, name, address, telephone number, local number, social security number, whether applicant for employment was a member or applicant for membership in the Union, work capabilities and last employment.

A 3-inch by 5-inch work card was made for each union member and those for unemployed members were placed upon a wheel, a frame index upon which these cards could be attached. These work cards contained the member's name, social security number, work classification and capabilities. Upon these cards notations were made as to each job to which the man was referred, the date upon which he reported himself unemployed, and various tele-

⁵ Occasionally the employee is dispatched without the referral which is thereafter mailed to the employer.

phone or personal contacts or attempted contacts and other pertinent information regarding employment. These cards are kept on the wheel in order as of the time each individual reported himself unemployed.

The information cards required to be filled out by "applicants and others" were kept in ordinary box files.

When an employer telephoned into the union hiring hall for a man having a certain job capacity, the secretary would go to the wheel where the work records of the members were kept in the order of the time the man reported himself available for work and would select therefrom the first card of a man having the requisite capacity and dispatch him, if available, to the job. If that man were not available for any reason, the next man on the wheel having the requisite classification would be dispatched. As there are many classifications of workmen in this field, the man selected might well not be the one whose card was number 1 on the wheel for that individual might well not have the qualification requested. In other words, the man whose card was number 1 on the wheel might be qualified to operate a caterpillar while the request might have been for a crane operator. Hence the secretary would have to go down the wheel until she finally located the first crane operator who was out of work and he would be dispatched. Conceivably this card might be the very last card on the wheel but still be the first card of a man having the qualifications sought.

In the event that there happened to be no unemployed member in the classification requested, then the secretary would turn to the files of the "Applicants and Others" for a qualified individual. If located in this file, the secretary would dispatch such individual to the job with a union job referral. Such an individual dispatched would be required to pay a fee of \$2.50 per week for each *work* he worked upon the the job to which he was dispatched. Oftentimes, such individual *work* at the time of referral make application to join Local 12 although this was not a universal practice, according to the only evidence given at the hearing. Of course, such individual would be required to make application and join the Union after holding the particular job for 30 days in accordance with union-security provision of the contract between the Union and the AGC, if the contractor was a member of AGC, or in accordance with whatever contract was in force between the Union and the contractor involved.

From his brief it appears that the only attack which the General Counsel now makes against the hiring hall was "the practice" of having the "Applicants and Others" execute an application for membership at the union office at the time he picked up his first referral to a job. Of course under the Act such an employee had 30 days in which to file such an application for membership. This was so under the agreements with the employers. However there is no thing in the Act which deprives an employee of the right to apply for membership prior to the expiration of that 30-day period if he so

desires. The fact that it was the "practice" to have such an employee sign an application for membership at the time of his first referral is not proof that the signing of such an application for membership was a condition precedent to the securing of the referral—which, if true, would be definitely a violation of the Act. However there is no showing in this case of any such illegal requirement. Nor is there any showing here that this signing was not with the individual employee's consent and for his individual convenience. Especially is this true in view of the testimony of a union official that he knew of men dispatched to jobs without having paid a "dime" to the Union, although apparently there was also a "practice" to have the employee pay a part of his initiation fee at the time of the referral. That practice also may well have been for the material convenience of the man as well as the Union. In the absence of proof that the making of an application for membership and the payment of all or a part of the fee was a condition precedent to the referral to the job, the undersigned would be guessing and conjecturing if he held such an indefinite "practice" to be violative of the Act. Under the law the undersigned is prohibited from accepting suspicion and conjecture in the absence of proof. The undersigned, therefore, on this record must hold that the hiring hall and practice thereunder were legal under the Act.

Originally the General Counsel appeared to contend that the existence of the two categories of un-

employed, i.e. the "Members" and the "Applicants and Others," constituted discrimination under the Act. As noted above this contention now seems to have been dropped. The two categories of unemployed workmen appears to be fully justified by Section II, B (b) which gives secondary preference in referral to: "Workmen who have been employed by contractors in the respective Local Union's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment." As the contract required that all employees become members of the Union within 30 days of their employment by AGC contractors, it is clear that only members of Local 12 would have worked for the AGC contractors in the past 10 years. It is equally obvious that transfers from other local unions outside the jurisdiction of Local 12 and new applicants for work would not have worked for the AGC contractors during the past 10 years and, hence, would not qualify for preference under this section of the contract. As the General Counsel has renounced his intention to attack the contract upon which the hiring hall is based, it seems clear that he is in fact acknowledging the legality of the preference set up in the contract. In this the undersigned agrees with the General Counsel.

Thus it appears that the hiring hall and the procedures set up under the contract between the Respondent and the AGC are legal and permissible under the Act.

2. Robert A. Holderby.

(a) The facts.

Holderby became a member of the Union in November 1952, and was thereafter referred by Respondent for work to numerous contractors in the Los Angeles area. Almost without exception these jobs were of short duration with the longest being for a period of about six weeks.

During the winter of 1952, Holderby became delinquent in the payment of his dues and, as a result, he was suspended from membership in January 1953. Subsequently he made arrangements to obtain reinstatement and on March 18, 1953, received the following letter from the Union:

(Letterhead of International Union of Operating
Engineers Local Union No. 12)

"Mr. Robert A. Holderby,
817 South Hobart, Los Angeles, California

Dear Sir and Brother: March 17, 1953

Please be advised that your case was referred to the District Advisory Board of District No. 1 at its meeting on February 27, 1953 and it was the recommendation of the Advisory Board, that you be granted the privilege of Reinstating your membership by the payment of back Per Capita tax, Reinstatement Fee of \$5.00 dues for the current month, and three months dues in advance.

Our records show that your last dues were paid through the month of October, 1952 and that you were reported as no longer in good standing as of

January 31, 1953. This action was taken in accordance with provisions contained in the Constitution of our International Union, which states that members whose dues are two months in arrears are no longer in good standing.

The following amounts are therefore required for you to Reinstate your membership:

Per Capita tax—November-December 1952	\$ 2.00
Per Capita tax—January-February 1953..	2.00
Reinstatement Fee	5.00
Current month's dues	5.00
Three months' dues in advance.....	15.00
	<hr/>
Total	\$29.00
Less Payment to Date.....	10.00
	<hr/>
Balance	\$19.00

The above-mentioned consideration has been granted to you contingent upon your submitting a reinstatement from your doctor substantiating your illness during the last few months of 1952. It will be necessary therefore that you submit a doctor's statement before your Reinstatement can be accepted on the above-mentioned terms.

Kindly give this matter your immediate attention.

Fraternally yours,

/s/ Wm. C. Carroll, Financial Secy.,
I.U.O.E., Local Union No. 12"

WCC:RLM;sa

However, after paying the required reinstatement fees to Respondent as shown in the above letter, the Union under date of June 9, 1953, sent Holderby the following letter:

(Letterhead of International Union of Operating Engineers, Local Union No. 12)

“Registered

Return Receipt Requested

June 8, 1953

Mr. Robert A. Holderby

3198 West 7th Street

Los Angeles, California

Dear Mr. Holderby:

The Executive Board of Local Union No. 12 at its meeting on June 6, 1953, rescinded all previous action pertaining to your application and reinstatement into Local Union No. 12, International Union of Operating Engineers, and by action properly taken rejected your application for reinstatement and ordered that all monies paid by you to this Local Union be returned.

By this order, I am enclosing herewith a check in the amount of one Hundred Thirty-eight Dollars and Sixty Cents (\$138.60), which indicates the total amount paid in by you in Initiation Fee, Dues, Permits, etc.

Very truly yours,

/s/ P. A. Judd, Rec.-Corres. Secy.

I.U.O.E., Local Union No. 12”

PAJ;aw—Encls.

During this whole period of time, including that while suspended, Holderby was being referred to jobs regularly. However, on his record card which was on the unemployed wheel there appears the following notation of four lines:

6-9-53 Per Carroll
 Money refunded
 No longer a member
 to be cleared

And under date of 6-25-53:

to be kept on
 list per Mr. Bronson.

On June 9, 1953, Holderby had been referred to and was operating equipment belonging to C. J. Payne for the County of Los Angeles. He remained on that job, according to his own testimony, for a period of approximately 15 days. The union record for this period, however, shows the following:

6- 9-53—C. J. Payne (Roller Opr.)
 6- 9-53—R. I. [reported in as unemployed]
 7- 8-53—R. A. Watson (Oil on N. W. Crane)
 7- 9-53 — Job Cancelled (contractor contacting Holderby)
 7-14-53—R. I. [reported in as unemployed]
 8- 8-53—NHL M. [not home, left message]
 8-20-53—NHL M. [not home, left message]
 8-20-53—Co. 2:30 p.m. [called office]

The union record, which Holderby acknowledged was, with the one exception noted above, accurate, contains no further notations until April 6, 1954, when there is a notation indicating that Holderby called the office wanting "booth th. no."

The undisputed evidence of Holderby shows that on the weekly out-of-work list published by the Union after June 8, 1953, Holderby's name was moved from the category of "Members" to the top of the category of "Applicants and Others" where it has remained at all times subsequent thereto.

Sometime after June 8, 1953, Holderby brought suit in the Superior Court of the State of California in and for the County of Los Angeles for a declaratory judgment against the Union to have: (1) his ouster from Local 12 declared "void and absolutely without legal effect," (2) to secure an order upon Local 12 to reinstate him as a member in good standing with full rights and privileges as such, and (3) for his actual damages suffered by reason of his unemployment subsequent to June 8, 1953.

The minutes of the Court, dated February 3, 1954, in the above suit show:

In cause submitted 12/16/53, Judg. as follows: Defendants are ordered to reinstate the plaintiff forthwith; Judgment for plaintiff in sum of \$700 damages, and in addition, \$125.00 per mo. until such time as plff. is reinstated. Plff's. attorney directed to prepare Findings & Judgment.

This case is now on appeal.

The remainder of Holderby's work record from the union work card up to the time of the hearing was as follows:

Robert Holderby No. 557-28-7861

8-20-53—Ca 2:30

4- 6-54—Ca Wanted booth ph. no.

- 4- 8-54—Gave new phone no.
- 4- 9-54—Wants to oil
- 5- 4-54—Checked phone no.
- 5-20-54—8:50 a.m. By.
- 5-24-54—By. 10:15 a.m.
- 5-24-54—In hall no. transp.
- 6- 3-54—Job on Barber Green
Too. far 1:30 p.m.
- 6- 3-54—Ball & Harms (W. Wheel 10 oper),
- 6-14-54—R. I. 8:05 a.m.
- 6-14-54—Gone new ph. no.
- 6-16-54—Ca gave new phone no.
- 6-16-54—Ca. 4:30 p.m.
- 6-18-54—Ca. 10:10 a.m.
- 6-18-54—Ca
- 6-18-54—Macco (Monitaowac oiler)
- 7-14-54—R. I. 2:30 P. M.
- 7-22-54—McDonald & Kruze
- 7-22-54—Ca 12:40 pm
- 8-13-54—R. I. 2:00 p.m.
- 8-16-54—Gave new phone no.
- 8-19-54—Schroeder Co. Screed opr.
- 8-24-54—R.I.
- 8-24-54—Refused concrete finishing job
Too far
- 8-26-54—Ca. 12:00
- 8-26-54—Osborne—Roller Oper.
- 9-28-54—R. I. 12:25 P.M.
- 10- 7-54—In hall 2:30 p.m.
- 10-11-54—In Hall

The testimony of Holderby also shows that between August 1953, and the first part of December

1953, he was employed as an automobile truck salesman by Courtesy Chevrolet Company and then following his dismissal by that company, by Midway Motors. Although this testimony raised the question of Holderby's availability for work out of Local 12, he testified that he was always available and further testified without contradiction that he did not turn down any referrals from the Union during this period of time as he was, in fact, anxious for the work. During this same period of time Holderby was also active in soliciting members in an organization called "Democracy for Labor Unions" which was an avocation without remuneration, according to Holderby.

Holderby also testified that he made efforts to obtain jobs in the construction industry by personal application to various contractors but was informed on each occasion that there was "not much work right now" or "no work."

(b) Conclusions

Counsel for the Respondent points out that "there is no showing in the testimony that there was any jobs available that Holderby might have filled which he did not obtain because of any failure of the Union to properly refer him out * * *" General Counsel attempts to answer this contention, originally raised during oral argument at the hearing, by contention that because of Holderby's work record on numerous jobs from July 14, 1952, through June 1953, "accordingly, it stands to reason that from the period of July 1953, to June 1954, cer-

tainly some jobs must have become available to which he should have been referred but was not." General Counsel also sees confirmation of this contention in:

Holderby's uncontradicted testimony is that he was always available for employment and indeed sat around the hall for months looking for jobs. This testimony is all the more impressive when his 1954 record is examined. Thus, for no apparent reason, and two days after the issuance of the complaint herein he is suddenly referred to a job for the first time in 11 months and is thereafter kept at work with the same general degree of frequency as he had been prior to his expulsion from the Union, while his name remains on the same list, i.e., the "Applicants and Others" list. Then, when it becomes apparent that he will not drop the charge but will continue the case, the supply of jobs is shut off just as abruptly as it was started. There is no evidence that jobs suddenly became more available in June, that jobs had not been available all along and the inference is unmistakable that his referrals to jobs was not based upon his location on the list without regard to other factors.

This inference is not as "unmistakable" as the General Counsel sees it because Holderby himself testified that, in addition to seeking work futilely from numerous employment agencies, he also sought work from a number of contractors individually during this same period and was told without exception "no work" or "not much work right now." He was unable to secure employment in the con-

struction industry even though the contractors had the right to request an employee by name. Holderby's own testimony made it clear that there was little work available in the construction industry around Los Angeles during the period he was supposedly available for work. In view of his employment by two motor companies, his availability for work in the construction industry becomes, at least, questionable. Holderby also acknowledged that he had been discharged by several contractors which might well have restricted the job opportunities for him. Nor does the work record after April 1954 appear to justify Holderby's claim of availability for he appears to have become quite particular about the referrals he would accept for it is to be noted that some referrals were refused by him as being "too far" or because of a lack of sufficient transportation. The record seems to indicate something less than anxiety for employment on the part of Holderby.

Upon the fundamental question of whether it is incumbent upon the General Counsel to show the availability of employment for which the claimant was qualified and a refusal to refer him thereto, it would seem that such a showing would be fundamental element in proving discriminatory treatment. Certainly, if during this period of time there was no work for which Holderby was qualified, then there could be no discriminatory treatment as to him merely because he was not employed during that period. In other words, if there were no jobs available, there could be no referrals.

Thus, in order to prove discriminatory treatment as to Holderby, it was incumbent upon the General Counsel to prove that there were jobs available for employees with Holderby's capabilities and, further, that he, Holderby, was not referred to those jobs. In the absence of such proof, the undersigned is left with nothing but suspicion and may guess and conjecture but is prevented by the law from making any finding of discriminatory treatment in the absence of proof of available work.

It is true, as the General Counsel points out, that the weekly out-of-work lists had been destroyed by the Union which, of course, might increase the difficulties of proof, but, as there was no showing that this destruction had anything whatsoever to do with the claim of Holderby, certainly this destruction would not, and should not, eliminate the necessity for the proof of an essential element of the cause of action set forth in the complaint. The undersigned must, therefore, recommend that the complaint as to Holderby be dismissed.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Union of Operating Engineers, Local No. 12, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.
2. The Respondent has not engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the complaint against International Union of Operating Engineers, Local No. 12, AFL, be dismissed in its entirety.

Dated at Washington, D. C., this 14 day of December, 1954.

/s/ THOMAS S. WILSON,
Trial Examiner

Affidavit of Service and Postal Return Receipts attached.

United States of America

Before The National Labor Relations Board

Case No. 21-CB-564—I.U.O.E., Local No. 12, AFL,
and Robert A. Holderby, An Individual.

Case No. 21-CB-536—I.U.O.E., Local No. 12, AFL,
and Frederick R. Hummel, An Individual.

Case No. 21-CB-586—I.U.O.E., Local No. 12, AFL,
and Hoyt Covert, An Individual.

DECISION AND ORDER

Statement of the Case

Upon charges filed by Frederick R. Hummel, Robert A. Holderby, and Hoyt Covert, on November 16, 1953, February 15, 1954 and April 8, 1954,

respectively, the General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional Director for the Twenty-First Region (Los Angeles, California), issued a complaint dated June 1, 1954, and an amendment thereto, dated August 11, 1954, against International Union of Operating Engineers, Local No. 12, AFL, herein called the Respondent, the Union, or Local 12, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Copies of the charges, the consolidated complaint and amendment thereto, together with notice of hearing were duly served upon the Respondent and the charging parties.

The amended complaint alleged in substance that the Respondent had violated Section 8 (b) (1) (A) and (2) of the Act by the following conduct: (1) refusing to refer Robert A. Holderby to a job with any employer-member of Associated General Contractors, Southern California Chapter; (2) operating its job dispatch system in a discriminatory manner by (a) giving preference in referrals to its members, (b) requiring nonmembers dispatched to jobs to pay work permit fees of \$2.50 per week, and (c) requiring nonmembers to pay a substantial part of the union initiation fee and advance dues at the time of their first dispatch to a job; and (3) attempting to cause an employer, United Concrete Pipe Corporation, to discriminate against Hoyt

Covert, one of its employees, in violation of Section 8 (a) (3) of the Act. On June 18 and September 7, 1954, the Respondent filed answers to the consolidated complaint and to the amended complaint, respectively, denying all the principal allegations.

Pursuant to notice, a consolidated hearing was held in Los Angeles, California, on October 18 and 19, 1954, before Thomas S. Wilson, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented and participated in the hearing. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the close of the hearing, the parties argued orally before the Trial Examiner and subsequently filed briefs with him. During the course of the hearing, the Trial Examiner made rulings on motions and on the admissibility of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.

On December 14, 1954, the Trial Examiner issued his Intermediate Report, copies of which were duly served upon the parties. In the Intermediate Report the Trial Examiner found that the Respondent had not engaged in any unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act, and recommended that the complaint be dismissed in its entirety.

Thereafter, the General Counsel filed exceptions

to the Intermediate Report¹ and a supporting brief. The Respondent filed a brief in support of the Intermediate Report.

The Board has considered all the exceptions and, to the extent indicated hereinafter, finds them to have merit. Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the Associated General Contractors

The General Counsel and the Respondent stipulated at the hearing that the testimony in Case No. 21-CB-548, Local 1400, United Brotherhood of Carpenters and Joiners of America, AFL, with respect to the business of Associated General Contractors, referred to herein as AGC, be considered a part of the record in the instant case. The testimony indicates that in 1953 and 1954, AGC members did several million dollars worth of construction work at a Marine training base at Twenty-nine Palms, California, and at an Air Force base near Las Vegas, Nevada.

We find that AGC is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.²

¹ The General Counsel did not except to the Trial Examiner's recommendation that the complaint be dismissed insofar as it applied to Hummel and Covert. The Board therefore adopts these recommendations without passing on the merits.

² Maytag Aircraft Corp., 110 NLRB No. 70.

II. The labor organization involved

International Union of Operating Engineers, Local No. 12, AFL, is a labor organization admitting to membership employees of members of Associated General Contractors.

III. The alleged unfair labor practices

A. The bargaining agreement.

For many years, the Respondent together with other construction trade unions have been parties to collective bargaining agreements with AGC. At all times material herein, the bargaining contract between these parties contained the following hiring provisions:

II.

A. That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective bargaining representative of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor as of the date of this Agreement. * * *

That subject to this understanding the Contractors shall have entire freedom of selectivity in hiring and may discharge any employee for any cause which he may deem sufficient, provided there shall be no discrimination on the part of the Contractors against an employee, nor shall any such employee be discharged by reason of any Union activity not interfering with the proper performance of this work.

It is the intention of the parties that all workmen covered hereby shall be or become forthwith upon employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and on whose behalf this Agreement is executed, as a condition of employment, and that this provision shall become operative without further notice or amendment whenever amendments to or judicial interpretations of the Labor-Management Relations Act of 1947 remove the inhibitions against the application of this paragraph now existing under the present wording and judicial interpretations of that Act.

It is agreed that all workmen covered hereby shall be or become, not more than thirty (30) days after employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and on whose behalf this Agreement is executed, and shall remain available for work as a condition of employment.

B. That in the employment of workmen for all work covered by this Agreement in the territory above described, the following provisions, subject to the conditions of Article II-A, above, shall govern:

1. That the Local Unions shall establish and maintain open and nondiscriminatory employment lists for employment of workmen in the work and

area jurisdiction of each respective Local Union of each particular trade.

That the Contractors shall first call upon the respective Local Unions having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local Unions, or their Agents, shall immediately furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors.

That the respective Local Unions, or their Agents, will furnish each such required competent workmen or skilled mechanic entered on their lists, to the Contractors by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local Unions' listing in the following manner:

(a) Workmen who have been recently laid off or terminated in that respective Local Union's work and area jurisdiction by the Contractors now desiring to re-employ the same workmen in that same area provided they are available for employment.

(b) Workmen who have been employed by Contractors in the respective Local Union's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and who are available for employment.

(c) Workmen whose names are entered on the list of the respective Local Union having work and area jurisdiction and who are available for employment.

* * * * *

That workmen employed by the Contractors for a period of thirty (30) days continuously or accumulatively within the multiple-employer unit and procured in accordance with II, B-1, (c), above or procured from other sources by the Contractors themselves, shall become members of the appropriate craft Union signatory hereto immediately, upon terms and qualifications not more burdensome than those applicable at such times to other applicants to such Union.

B. Operation of Local 12's dispatch system.

Based upon this agreement, Local 12 operated a job referral or dispatch system for supplying the requirements of AGC members for operating engineers and allied classifications. Telephone calls from these employers were made to the union office for workmen qualified to operate specific types of equipment. The Respondent maintained two referral lists. The first was headed "Members" and included all members of Local 12 who had reported that they were seeking work. According to the testimony of McNeel, an official of Local 12, there was no distinction in this group between those Local 12 members who had and those who had not previously worked for employers who were part of the AGC unit. The second group was entitled "Applicants and Others" and included members of other Locals of International Union of Operating Engineers who had transferred into the geographical area of Local 12 as well as any nonunion workman who applied at the dispatch office for work within the Local's jurisdiction.

When an employer requested a workman with particular qualifications, an employee in the office of Local 12 would first examine the "Members" list for a qualified individual. If that list did not contain an individual with the proper qualifications, the clerk would then resort to the "Applicants and Others" list. An individual dispatched from the latter list was required to pay a work permit fee of at least \$2 per week.³

Under the union-security provision of the bargaining agreement, individuals newly hired in the multi-employer unit had 30 days within which to join Local 12, although as we have noted in footnote 3, the constitution of the International Union prohibits any of its Locals from issuing a work permit to anyone who has not already applied for membership. Moreover, the practice of Local 12 conformed to the requirements of the International's constitution. McNeel testified that it was the practice for applicants for employment to apply for membership at the time of their first referral,

³ Article XV, Section 3 (e) of the International Union's constitution requires each Local which permits applicants for membership to work under a contract with, or under control of, the Local to charge minimum weekly permit dues of \$2 of each hoisting or portable engineer or apprentice. Section 3 (h) provides that no temporary permit for work shall be issued to anyone who is not either a member of the International or an applicant for membership therein. The Trial Examiner found that the Respondent charged \$2.50 per week for a work permit. The Respondent did not except to this finding.

although on occasion an applicant might be dispatched to a job without paying any part of the initiation fee which was due when a membership application was submitted.

C. Robert A. Holderby.

Holderby obtained referrals through Local 12 beginning in September 1951. In January 1953, he was suspended from membership for dues delinquency, but was reinstated two months later upon payment of all the fees and dues for which he was liable. In June 1953, the executive board of Local 12 expelled him from the Local by rejecting his previous application for reinstatement, and returned to him all the initiation fees, dues and permit fees which he had ever paid to Local 12. Between January 1953, when he was first suspended, and June 1953, when he was finally expelled, Holderby continued to be regularly dispatched to jobs, but immediately upon his expulsion his name was removed from the "Members" out-of-work register and placed at the top of the "Applicants and Others" list. Thereafter, for approximately 12 months he was never sent out on a job although on one or two occasions the dispatcher attempted to notify him of a possible referral. On June 3, 1954, two days after the issuance of the complaint he was offered two jobs on the same day and continued to be dispatched fairly regularly until shortly before the hearing, when again no jobs were made available to him.

For about four months during this period, Hold-

erby was employed as a truck salesman working on commission. He testified that during the entire period in which he was not being referred to jobs by Local 12, he was available for work as an operating engineer, and had attempted to obtain construction jobs through personal applications to contractors. At no time was he successful in obtaining work within Local 12's jurisdiction directly from contractors.

D. Conclusions.

1. The complaint does not allege that the hiring arrangement agreed to by AGC and Local 12 is invalid, and the General Counsel limited his case to attacking as discriminatory only certain practices followed in the operation of that system.⁴ The General's failure to allege that the agreement was itself illegal, precludes the Board from making any finding on that point.

But apart from the question of the agreement's validity under Section 8 (a) (3), we nevertheless

⁴ The Trial Examiner expressed bewilderment as to the General Counsel's theory of the case, although the complaint, the presentation of the case, and the brief to the Trial Examiner make it clear that the General Counsel considered as violative only the practices discussed below, and not the agreement itself. Despite his stated inability to understand the basis for the action, the Trial Examiner discussed the practices used by Local 12 in its dispatch procedure. His failure to find any violation on the Respondent's part is not, therefore, due to any deficiency in the General Counsel's case.

find that, in the following particulars, the dispatch system was not being administered by AGC⁵ and Local 12 in accordance with its terms.

(a) Under the contract dispatch procedure, a qualified individual who had worked in the AGC unit within the previous 10 years was entitled to referral preference over others, including members of Local 12 and applicants for membership. In practice, however, union members were given job preference regardless of whether they had ever worked in the AGC unit. Moreover, Holderby's name was removed from the preferred "Members" list after he was expelled from Local 12 despite his right to preference as a former worker within the AGC unit.

(b) Under the agreement, a nonunion workman dispatched by Local 12 was not required to join the Union until after 30 days of continuous or accumulative employment within the AGC unit. It was the practice, however, for nonunion prospective employees to apply for union membership immediately upon their first dispatch. The Respondent con-

⁵ Although AGC is not a respondent, we believe that its delegation to Local 12 to operate the dispatch system did not relieve it of a responsibility to insist that the Union fulfill its contractual obligation of maintaining nondiscriminatory hiring lists. AGC is not, of course, a necessary party respondent to a complaint alleging a violation of Section 8 (b) (2). *Radio Officers' Union of the Commercial Telegraphers' Union, AFL*, 347 U. S. 17, enforcing 93 NLRB 1523, 1527; *National Union of Marine Cooks and Stewards*, 92 NLRB 877.

tends that this was voluntary on the part of each prospective employee, and that discrimination against nonunion employees or prospective employees cannot be presumed as long as there was no compulsion by the Union to require them to apply for membership immediately. We believe that in fact nonunion employees could not exercise a free choice between applying for union membership immediately or after the first 30 days of employment. Job applicants were aware that their only chance of obtaining employment with AGC employers was through Local 12's dispatching office. To say, as the Respondent does, that all job applicants voluntarily applied for membership immediately, is to ignore the practical situation in which such applicants were placed. Realistically, they were in no position to stand on their statutory right of refusing to submit an application for membership in the Union for at least 30 days. The fact that prospective employees were, on occasion, dispatched before they had paid any part of their initiation fee is corroboration that immediate application in the Union was obligatory, since only applicants were required to pay initiation fees. Nor does any relaxation by Local 12 of its usual practice of requiring some part of the initiation fee immediately excuse the violation of denying to job applicants the 30-day grace period given them by the statute. Moreover, we have no reason to believe that Local 12 did not abide by Section 3 (h) of Article XV of the International's constitution which prohibits a local union from issuing a temporary work permit to

anyone who is not either a member of the International or an applicant for membership.

(c) The contract makes no provision for the payment of work permit fees by nonunion applicants for employment. In practice, nonunion applicants using the Respondent's dispatch system were required to pay at least \$2.00 per week for the right to work for AGC members, whereas Union members were not required to pay such a fee. The Respondent neither contended nor proved that this special charge levied upon nonunion applicants was in any way related to the cost of operating the dispatch system for the benefit of such employees.

By the aforesaid practices, the Respondent caused the Employers to discriminate against nonunion applicants for employment to the advantage of Union members.

2. The General Counsel contends that, after expelling Robert Holderby from membership, the Respondent denied him further job referrals in violation of Section 8(b) (2) and (1) (A) of the Act. The Respondent does not deny that it removed Holderby's name from the preferred "Members" list when it expelled him from the Union, but it argues that the General Counsel has not proved that there were jobs available to which Holderby would have been referred but for the removal of his name from the "Members" list. In answer to this contention, the General Counsel asserts that the mere removal of Holderby's name from the contractual preferred list because he had lost his Union membership was a violation of the Act, and that the extent to which

Holderby actually suffered loss of employment as a result of the removal is a matter for determination at the compliance stage of the proceeding.

We agree with the General Counsel. It is clear that, for the purposes of job referral, Local 12 refused to consider Holderby on an equal basis with individuals who were entitled to preference under the AGC agreement, simply because he was no longer a member of Local 12. "This denial of equal access to the available jobs was in itself and without more a restrictive imposition in violation of the Act."⁶ Because of the casual and occasional nature of the jobs to which Holderby had been referred before his expulsion and because of the practice of preferring union members, we are unable to determine now to what extent Holderby was injured by the unlawful system of preferences. This is, however, a matter which can properly be settled in the compliance stage of the proceeding.

We find, accordingly, that the Respondent violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act by operating the dispatch system authorized under its agreement with AGC so as to discriminate against nonmembers of Local 12 in the following respects: by equating the preference in job referrals to which workmen in the AGC unit within the past 10 years were entitled with membership in Local

⁶ *N. L. R. B. vs. Local 803, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL*, 218 F.2d 299, (C.A. 3), January 12, 1955, 35 LRRM 2355, enforcing 107 NLRB 1011.

12, thereby giving preference in job referrals to the latter; by requiring prospective nonunion employees to apply for membership in Local 12 immediately upon their first referral; and by imposing a permit fee on nonunion employees when working in its jurisdiction within the AGC unit.⁷ We also find that by removing Holderby's name from the "Members" list because of his expulsion from the Union, thereby denying him equal access to jobs, the Respondent further violated Section 8 (b) (2) and (1) (A) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of Associated General Contractors, Southern California Chapter, described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing the free flow of commerce.

V. The remedy

Having found that the Respondent operated its dispatch system in a discriminatory manner by preferring its members in job referrals over nonunion workmen or job applicants, thereby engaging

⁷ Local 420, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL, 111 NLRB No. 190.

in certain unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make Robert A. Holderby whole for any loss of pay suffered by him as the result of its unlawful conduct, by payment to him of a sum of money equal to the amount he would normally have earned as wages if his name had not been removed from the list of those entitled to job preference by their employment within the past 10 years in the AGC unit. In computing the amount of back pay due Holderby, the customary formula of the Board set forth in *F. W. Woolworth Company*, 90 NLRB 289, shall be applied. As the Trial Examiner did not find that Local 12 discriminated against Holderby, the period from the date of the Intermediate Report to the date of the Order herein shall, in accordance with our usual practice, be excluded in computing the amount of back pay due him.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Associated General Contractors, Southern California Chapter, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. International Union of Operating Engineers,

Local No. 12, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By causing the aforementioned multi-employer Association to discriminate against employees and prospective employees in violation of Section 8 (a) (3) of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

4. By restraining and coercing employees and prospective employees of the multi-employer Association herein involved in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Union of Operating Engineers, Local No. 12, AFL, its officers, agents, successors, or assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause employer-members of Associated General Contractors, Southern California Chapter, to discriminate against non-

union employees, including Robert A. Holderby, and prospective employees by operating the dispatch system provided for in their collective bargaining agreement, so as:

(i) to give preference in job referrals to its members,

(ii) to require nonunion applicants for employment to apply for membership in Local 12 immediately upon their first referral, and

(iii) to impose work permit fees on nonunion employees who work within its craft jurisdiction in the AGC unit;

(b) In any like or related manner restraining or coercing employees or prospective employees of employer-members of Associated General Contractors, Southern California Chapter, in the exercise of the rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in Local 12 as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Robert A. Holderby for any loss of pay he may have suffered as a result of the discrimination against him, in the manner set forth in Section V, above, entitled "The remedy";

(b) Post in conspicuous places at the job dispatching offices of the Respondent, and in all places where notices or communications to its members or applicants for employment are customarily posted,

copies of the notice attached hereto and marked Appendix.⁸ Copies of said notice to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Mail to the Regional Director for the Twenty-first Region signed copies of the notice attached hereto as Appendix, for posting, the employers willing, at the job sites of employers who, through membership in the Associated General Contractors, Southern California Chapter, obtain employees through Respondent's dispatch system. Such notices are to be posted and maintained for a period of sixty (60) consecutive days after receipt by the employers. Copies of the notices to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by an official representative of the Respondent, be forthwith returned to the Regional Director for posting;

(d) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days

⁸ In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

from the date of this Order, what steps the Respondent has taken to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges a violation of Section 8 (b) (1) (A) or 8 (b) (2) of the Act with respect to Frederick R. Hummel or Hoyt Covert.

Dated, Washington, D. C., August 15, 1955.

GUY FARMER, Chairman

IVAR H. PETERSON, Member

PHILIP RAY RODGERS, Member

(Seal) National Labor Relations Board

Abe Murdock, Member, dissenting:

It seems to me that the majority has misconceived the nature of the unfair labor practice to be determined in this case. No section of this Act forbids discrimination by labor organizations. Employers alone under Section 8 (a) (3) are forbidden to discriminate against their employees to encourage or discourage union membership. Unions, on the other hand, are forbidden under Section 8 (b) to (2) to "cause or attempt to cause" such discrimination *by an Employer*. It is therefore completely outside the applicable proscription of this Section of the Act to find, as the majority does, that the Respondent Union discriminated "against nonmembers of Local 12." The fact that the Respondent Union may have referred one employee rather than another to prospective employers is not sufficient, in

my opinion, to prove that the Union *caused* a particular employer to engage in an act of discrimination. Indeed, the record in this case contains not the slightest evidence that any employer took any action or was induced or requested by the Union to take any action to the detriment of any employee. In this respect, at least, the *Boilermakers* case upon which the majority relies is entirely inapposite. There the court found that the "record is clear that because the complainants were delinquent in union dues the *employers* refused to consider them on an equal basis with union men in good standing who were applying for such extra work as was available."⁹ (*Italics added.*)

The General Counsel does not contest the legality of the agreement between the Union and the contractors' Association whereby the Union agreed to refer applicants for employment to members of the Association. If, however, this contract is legal there is no act by any employer in this case which is even remotely related to discrimination against any employee. But the majority finds, nevertheless, that the Union caused the members of the Association to engage in acts of discrimination against employees and prospective employees. I am unable to determine from a reading of the majority's decision the basis of their conclusion that the referral practice of the Union, unauthorized under the terms of its contract

⁹ N.L.R.B. vs. Local 803, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL, *supra*.

with the Association, constitutes discrimination by members of the Association against employee applicants generally and Holderby in particular. If the majority is holding implicitly that the Union was acting as an agent of the Association, in discriminating among applicants in violation of Section 8 (a) (3), there is, in my opinion, no warrant for such a finding in this case. The only authorization extended to the Union by the Association was to refer applicants for employment in accordance with the terms of the contract which, as indicated above, is not alleged to be an unlawful agreement. Certainly, there is nothing in the common law rules of agency making members of the Association liable, as principals, for unauthorized acts of the Union, particularly where, as here, those acts are found to be in violation of a federal statute.

I believe the majority has misread the language of Section 8 (b) (2). The Statute clearly establishes that discrimination by an employer is a prerequisite to a finding of unlawful causation under Section 8 (b) (2). In the instant case the majority's decision, in effect, converts discrimination by a Union into discrimination by an employer. In my opinion, this goes beyond the literal language of Section 8 (b) (2) and the intent of Congress in its enactment.

For these reasons I dissent.

Dated, Washington, D. C., August 15, 1955.

ABE MURDOCK, Member
National Labor Relations Board

APPENDIX

Notice to all Members of International Union of Operating Engineers, Local No. 12, AFL, and to all Employees and Prospective Employees of Employer-Members of Associated General Contractors, Southern California Chapter, Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause or attempt to cause employer-members of Associated General Contractors, Southern California Chapter, to discriminate against nonunion employees, including Robert A. Holderby, and prospective employees by operating the dispatch system provided for in our collective bargaining agreement, so as:

- (1) to give preference in job referrals to our members;
- (2) to require nonunion applicants for employment to apply for membership in Local 12 immediately upon their first referral; and
- (3) to impose work permit fees on nonunion employees who work within our craft jurisdiction in the AGC unit.

We Will Not in any like or related manner restrain or coerce employees or prospective employees of employer-members of Associated General Contractors, Southern California Chapter, in the exer-

cise of the rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in Local 12 as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will make Robert A. Holderby whole for any loss of pay he may have suffered as a result of the discrimination against him.

International Union of Operating
Engineers, Local No. 12, AFL,
(Labor Organization)

By
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date of posting, and must not be altered, defaced, or covered by any other material.

Affidavit of Service and Postal Return Receipts attached.

Before the National Labor Relations Board
Twenty-First Region

[Title of Causes 21-CB-564, 21-CB-536, 21-CB-586.]

TRANSCRIPT OF PROCEEDINGS

Room 704, 111 West Seventh Street, Los Angeles,
California, Monday, October 18, 1954.

Pursuant to notice, the above-entitled matter
came on for hearing at 10:00 o'clock, a.m. [1*]

Trial Examiner Wilson: The hearing will come
to order.

This is a formal hearing before the National
Labor Relations Board in the case of the Inter-
national Union of Operating Engineers, Local No.
12, AFL, and Robert A. Holderby, An Individual,
et al., Case Nos. 21-CB-564, 21-CB-536 and 21-CB-
586.

The Trial Examiner appearing for the National
Labor Relations Board is Thomas S. Wilson.

Will counsel please state their appearances for
the record?

Mr. Grodsky: Appearing for the General Coun-
sel is Ben Grodsky.

Appearing for Robert Holderby, Robert A. Hol-
derby, himself.

Mr. Sokol: David Sokol for the Union.

Mr. McNeel: H. M. McNeel for the Union.

* * * * [4]

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

HAROLD M. McNEEL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: State your full name and spell your last name for us. [8]

The Witness: Harold M. McNeel, M-c N-e-e-l.

Trial Examiner: Thank you.

Q. (By Mr. Grodsky): What is your title?

A. Labor relations representative of Local 12, International Union of Operating Engineers.

* * * * [9]

Q. (By Mr. Grodsky): Mr. McNeel, does Local 12 have an agreement with the Associated General Contractors? A. It does.

Q. And do you have a copy of that agreement here?

A. I do. We haven't a copy of the, we only had one signed copy and I didn't bring that along of the newly negotiated agreement but our standard form agreement embodies all the provisions of the master labor agreement, BCA, EGCA, AGC and so forth.

Q. You mentioned a number of other initials. I think we might as well clarify them. You have a similar form of agreement to the one which I have and which I'm marking for identification as General Counsel's 2. It is labeled at the top "Standard Form Agreement" and consists of 17 numbered pages and an appendix of two additional pages marked "Appendix A," is that correct?

(Testimony of Harold M. McNeel.)

A. Correct.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. Grodsky): This standard form agreement is the agreement between yourself and the Associated General Contractors?

A. Not that agreement, not the standard form. The standard [10] form agreement is for independent contractors who are not members of either the AGC or BCA or EGCA.

Q. Have you had occasion to examine the complaint filed in this proceeding, Mr. McNeel?

A. Yes.

Q. And attached to the complaint is an excerpt marked Exhibit A purporting to set forth the union recognition clause in the Associated General Contractors during the period that was in issue in this complaint. Have you read that union recognition clause which was attached to the complaint?

A. I'm not just certain. I can tell by looking at it.

As far as I can see, it is identical to the provision of the master labor agreement.

May I compare just one paragraph?

Q. Surely.

A. That is not exactly correct according to the AGC agreement.

Mr. Sokol: Where?

The Witness: This is what I had reference to. That is a copy, supposedly.

(Testimony of Harold M. McNeel.)

Mr. Grodsky: Now, you are testifying. I would like you to tell us on the record——

Mr. Sokol: I think it's going to be confusing. Let's be off the record.

Trial Examiner: Off the record.

(Discussion off the record.) [11]

Trial Examiner: On the record.

As a result of the off the record discussion, I understand it has been stipulated that the Exhibit A referred to which is attached to and made part of the complaint is a true copy of the provision concerning union security in the AGC contract and will so be considered unless specific objections are raised during the course of the hearing.

Mr. Sokol: Unless we correct it.

Mr. Grodsky: That's right.

Trial Examiner: Fair enough. The stipulation will be received.

Q. (By Mr. Grodsky): With reference to other employers, you use the standard form of agreement which embodies a description of union recognition in Article 2 of the standard form, is that correct?

A. I can't——

Mr. Sokol: Well, it's the same thing.

Mr. Grodsky: There's slight differences. I'm not trying to mislead anybody. There appears to be some differences of words, at least.

The Witness: We are talking about two different contracts. This is a new, the contract negotiated this year and you are talking about last year's agreement.

(Testimony of Harold M. McNeel.)

Q. (By Mr. Grodsky): I see. Last year's contract, the standard form contract had identical language? [12]

A. Language of AGC and master labor agreement.

Q. That's right. And when you say master labor agreement, that is the agreement between yourselves and the Associated General Contractors, at least, the agreement between yourselves and the Associated General Contractors is the master labor agreement? A. That's right.

Trial Examiner: And that is the copy which is Appendix A attached to the complaint, at least, the recognition clause?

The Witness: Yes, that is correct.

Q. (By Mr. Grodsky): Now, Mr. McNeel, are you familiar with the hiring provisions in the union's constitution and by-laws and trade rules?

A. I think so.

Q. And could you tell us whether those hiring provisions require the employer to secure employees exclusively through your hiring hall?

Mr. Sokol: I object to that.

Mr. Grodsky: I thought we would save time. The objection is proper and I will withdraw the question.

Trial Examiner: All right.

Q. (By Mr. Grodsky): Do you have copies of the constitution, by-laws and trade rules?

A. I have.

Q. I trust you have duplicates? [13]

(Testimony of Harold M. McNeel.)

A. Maybe we can do that. Now, these are the old trade rules.

Mr. Sokol: When did these go out?

Mr. Grodsky: These are last year's.

Trial Examiner: Let's go off the record while you gentlemen get the exhibits.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Grodsky): I will ask you if General Counsel's 3 for identification is the constitution of the International Union of Operating Engineers. A. It is.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 3 for identification.)

Q. (By Mr. Grodsky): And General Counsel's 4 is the by-laws of Local 12? A. It is.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. And General Counsel's 5 is the trade rules and wage scales of Local 12 which was effective January 15, 1953?

A. Right, that is correct.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 5 for identification.)

Q. (By Mr. Grodsky): And those by-laws have, in part, been superseded by more current ones, is that correct? [14]

A. Not the by-laws, trade rules.

(Testimony of Harold M. McNeel.)

Q. Trade rules, is that correct?

A. That is correct.

Q. And the current trade rules will be found in General Counsel's 2 for identification?

A. That is correct.

Q. And they have not been printed up in a booklet? A. That is correct.

Mr. Grodsky: At this time I offer General Counsel's 2, 3, 4 and 5 in evidence.

Trial Examiner: Any objection?

Mr. Sokol: No objection.

Trial Examiner: Understanding there is none, I will admit them in evidence.

(The documents heretofore marked General Counsel's Exhibits Nos. 2, 3, 4 and 5, inclusive, were received in evidence.)

[See pages 149-157 for Exhibits 2, 3 and 4.]

Mr. Grodsky: Through the courtesy of the respondent, I'm offering them in duplicate.

Q. (By Mr. Grodsky): Now, Mr. McNeel, does Local 12 operate a hiring hall?

A. Not as such.

Q. Well, that is a rather peculiar answer. What does it operate which resembles a hiring hall?

A. Depends upon the definition of hiring hall. The common definition in labor movement, a hiring hall is where men come [15] in to be dispatched to work. That isn't our procedure.

Q. That isn't your procedure. All right, what is your hiring procedure?

A. Well, our hiring procedure is that a man

(Testimony of Harold M. McNeel.)

comes in or he can call in. He doesn't have to come in, place himself on the out-of-work list. And when he is dispatched to a job, he is dispatched by telephone, ordinarily. He either comes in and picks up his referral slips or it is mailed to the contractor's address or to him. He is not required to come into the hall.

Q. Are all men required to have referral slips when they go out to the job?

A. Well, they can, they are required to have a referral slip but not necessarily to go on the job. Sometimes in remote areas he may not get his referral for two or three days until the office has mailed it to him.

Q. But the man has to have made arrangements before he goes to work?

Mr. Sokol: I think that would be leading. If you want to get the facts, why not ask him?

Trial Examiner: Change your question.

Mr. Grodsky: I will try changing it to see what happens.

Q. (By Mr. Grodsky): I will ask you the other question I asked you again, Mr. McNeel. Does the man have to, before he goes on the job, must he have made arrangements to receive a [16] referral slip?

A. Ordinarily.

Q. And is that—

Trial Examiner: What do you mean by "ordinarily"?

The Witness: Sometimes there's exceptions.

Trial Examiner: All right.

(Testimony of Harold M. McNeel.)

The Witness: We don't go by the hard and fast rule but we have that rule if that is what you want to know.

Q. (By Mr. Grodsky): Is that rule covered by your trade rules? A. It is.

Q. I will show you the trade rules now and ask you——

Mr. Sokol: It's in there and I think asking him to read an exhibit that would be taking up time.

Mr. Grodsky: I just want him to refer to it.

The Witness: You want me to read this aloud?

Q. (By Mr. Grodsky): Just refer to Section 16.

Now, Section 16 doesn't provide for any exceptions, does it? A. No.

Q. Now, in the operation of the hiring hall, the complaint sets out that there are several wheels on which the names of certain groups of employees are entered in the union's offices.

Are you familiar with those wheels?

A. Fairly so. [17]

Q. What did you say, fairly so? A. Yes.

Q. You don't——

A. I, that is, that is not in my department but we do refer to the wheels occasionally.

Q. Do you know what information is carried on those wheels? A. Yes, sir.

Q. There are two groups of wheels, one is inactive and the other is active, is that correct?

A. No, sir, all active.

(Testimony of Harold M. McNeel.)

Q. They are all active? A. That's right.

Q. And how many wheels are there?

A. Well, are you referring to wheels, I presume that you mean the number of card indexes or the ones that are in the cards that are in the wheels. We have, as you know, some 15,000 of them there.

Q. You have—strike it. I will approach it from another point of view.

When an employer calls for an employee, that is a customary procedure, is it not, for an employer to make a telephone call requesting an engineer or a shovel operator to go on a job? A. Yes.

Q. In such situations, the call would come in normally to one [18] of the office girls?

A. Come into the dispatcher in the office, yes.

Q. What would be done at that point?

A. She would, depends on the classification. In other words, you know, we have many, many classifications. You mentioned the shovel operator. If a contractor called for a shovel operator, the girl would look down, the wheels are classified, also. She knows those people who are qualified to operate a shovel. So she looks at those cards that are shovel operators. Then she refers to the out-of-work list which she has to see if this man first is qualified as a shovel man. Then she puts in—he may not be at the top of the list, he may be way down on the list, so she calls him and says come pick up your clearance and go out to the job.

Q. Now, we have had——

(Testimony of Harold M. McNeel.)

Trial Examiner: Well, let me get something straight. You say he may not be at the top?

The Witness: At the out-of-work list.

Trial Examiner: By that you mean there may be other classifications who are out of work who are ahead of him on the out-of-work list, is that right?

The Witness: That's right.

Trial Examiner: But he would be the first of the out-of-work shovel operators?

The Witness: Yes. [19]

Trial Examiner: I get it.

The Witness: In the out-of-work list, I will explain that and then do away with a lot of questions.

In the out-of-work list, a man is not classified on the out-of-work list. He may be an oiler and he may be a cat-skinner or any other classification but on the out-of-work list he is not classified but the girl looks to see if they are on the out of work list or who is on the out-of-work list.

Trial Examiner: I see.

The Witness: In regard to dispatching, the particular man called for is called for by classification.

Trial Examiner: Yes.

Q. (By Mr. Grodsky): You maintain a single out-of-work list? A. Yes.

Q. And who is listed on that out-of-work list?

A. Everyone that has called in or come in and put their name on the out-of-work list.

Q. And with reference to the qualifications, do

(Testimony of Harold M. McNeel.)

you make any effort to determine the man's qualifications?

A. Not at the dispatching of a job necessarily because he is already classified as a shovel operator.

Q. And how does he achieve the classification, let's say, as a shovel operator?

A. Originally, initially, well, he starts out as an apprentice or oiler. It's not an indentured apprentice program. [20] This oiler might conceivably learn to operate a shovel in nine months, we will say, or it might take him two years or it might take him four years. And the contractor is the whole judge, not us. He is the one that classifies them, not us.

Q. Now, when a man feels that he is qualified to operate a shovel, he simply notifies the union of that fact and it is noted that he claims to be a shovel operator, is that correct?

A. Oh, no, not as simple as that. He calls before an advisory board and is asked as far as we can determine without going out on the job and watching him operate whether he is qualified to do that work.

Q. Then after you have made a kind of oral examination of the man, you will then note what his qualifications are and you will use that as a basis for reference, is that the way it works?

A. You mean reference, to whom?

Q. To the job.

A. No, we—I don't know what you mean by

(Testimony of Harold M. McNeel.)

referral, the referral or by reference, I don't know what you mean by reference.

Q. What I mean is that John Jones who has been working as an oiler, he comes up before your board and says, "I am qualified to be a cat-skinner, I am qualified to be a drag line operator, I am qualified to be a "B.C.D."

Your board then, which is, as I understand from your [21] testimony, a union board, is that correct?

A. Yes.

Q. The board then will ask him various questions and, let's say, that they determine that he is qualified in categories A, B, C and not qualified in the other categories in which he claimed qualification. Will they make a record that he is qualified to work in categories A, B and C?

A. I don't know that that has ever been done. If he is going to be a cat-skinner, then the board will interrogate him as a cat-skinner, not in all the other classifications and then if they think that he is in their opinion, then they will sign his application to come into 12 because he is not in the mother local at the time he is an oiler so he has to re-classify and be on as a journeyman classification.

Q. You have men in Local 12 who are qualified for a large number of jobs, don't you?

A. Yes.

Q. How does a man get to be qualified for a large number of different tasks?

A. Works the same way. He gets some contractor to let him run the different pieces of equipment

(Testimony of Harold M. McNeel.)

and he gets qualified. He is sent out on a job and maybe he is not qualified for the job, the contractor may send him back. We are, that is entirely in the——

Q. Mr. McNeel,—— [22]

Mr. Sokol: Let him finish.

The Witness: That is entirely within the contractor. We don't have anything to say about that.

Q. (By Mr. Grodsky): Maybe I don't make myself clear or maybe you don't. But, as I understand it, if a call comes in, let's say, for a screed operator, you look to see who has qualified for that—by you, I mean the person in the dispatching office—and you wouldn't send out someone whose qualifications don't show screed operator?

A. That's right.

Q. Let's assume that the man gets out on the job and that the contractor after a half day's work puts him to work, say, operating a tractor, caterpillar tractor. The man then thinks he is qualified to operate that piece of equipment. How will that be translated into him being referred out later to work as a caterpillar operator?

A. When he changes from one piece of equipment to the other, he must get a clearance to the other piece of equipment so we have a record of what piece of equipment he was on.

Q. After the man has worked on a piece of equipment, will it then automatically show in his record that he is qualified to work that additional piece of equipment?

(Testimony of Harold M. McNeel.)

A. As far as we are concerned.

Q. In other words, every time that a referral is made, made of that sort, if that referral is noted on to his work record—— [23] A. Yes.

Q. ——and thereafter if calls come in for, say, caterpillar operators, this man will be considered along with others? A. Yes.

Trial Examiner: May I break in here for a second?

Q. (By Trial Examiner): You say that a man must have clearance from your union before he can change from one type of equipment to another?

A. He isn't always required, but it is done. A man, it should be done, in fact, say it that way. It isn't a hard and fast rule.

Q. Suppose a man is sent out to a job as a cat operator and the employer, for some reasons best known to him, wants him to work on a shovel. Would the employer have to call the union and say, "We want to move Joe Blow from the cat to the shovel?"

A. No, they don't have to get permission from us to do that. The only time he would have to get a clearance would be when he went from one group to the other. We have, now, as you see on the wage scales and classifications, we have nine groups of pay scales.

Q. Oh.

A. So if he was in this group down here and transferred up to this top group, then he would get a clearance because the wage rate changes.

(Testimony of Harold M. McNeel.)

Q. Then, it's the change between wage rates that require a [24] clearance?

A. Between groups.

Q. I see.

Mr. Sokol: Is that so the union will know what scale he is entitled to?

The Witness: Yes, so we know the scale.

Q. (By Mr. Grodsky): With reference to the qualifications of the men, is there any way that the dispatcher can tell by looking at the card quickly what qualifications a man has?

A. To some degree.

Q. And how is that?

A. They can see how long they have been on a job. If they only worked one day and the next day the contractor sent him back, he couldn't do the work and the contractor sends him back, you will know pretty well that he's not a cat-skinner.

Q. The girls, the dispatchers don't make that evaluation, do they?

A. No, that is entirely up to the contractor.

Q. But what I'm getting at, is if a call comes in, let's say, for a shovel operator, would the dispatcher look at the first name on the out-of-work list and then go to her wheel and check if that person is a shovel operator? A. No.

Q. Well, how would she go about it?

A. As I explained before, each card is tabbed to tell who [25] is a shovel operator, who is a cat-skinner, who is a Barber Green operator.

Q. Which cards?

(Testimony of Harold M. McNeel.)

A. I'm talking about the cards in the wheel.

Q. That is what I'm getting at——

A. Those are tabbed so she can turn that over and see how many different classifications are there.

Q. How does she tell, you certainly have a lot of people who qualify in some of these categories, how can she tell which of those people are on the out-of-work list and what their position is?

A. She can't, she checks.

Q. In other words, what you are telling me now is she starts looking who is a shovel operator and then goes to the out-of-work list?

A. That's right.

Q. In that way she wouldn't be able to tell which was nearer the top of the out-of-work list, in other words, let's say, numbers 15 and 35 on the out-of-work list have the same qualifications and she goes to the wheel and finds number 15 on the out-of-work list is a shovel operator. She would have to go through your wheel and check every single shovel operator before she can determine that number 15 is the man who is entitled to the job, wouldn't she?

A. She could do it that way but it isn't always done that way. [26]

Q. Isn't it a fact that you keep the men who are out of work on a separate wheel from the men who are actually working?

A. Yes, we have an out-of-work wheel, yes.

Q. You have an out-of-work wheel?

A. Yes.

(Testimony of Harold M. McNeel.)

Q. You have, oh, you check your out-of-work list against the out-of-work wheel? A. Yes.

Q. I see, now we are getting some place. The people whose names are listed on the out-of-work wheel are your members, is that right?

A. That's right.

Q. And people who are not members of your Local 12 are not on that out-of-work wheel?

Mr. Sokol: Objected to as leading.

Trial Examiner: I suggest the objection is well taken as to the form of the question.

Mr. Sokol: The prior one, too, you are slanting the case to suit the objective that way. Try to get the facts.

Mr. Grodsky: I'm sorry. The pleadings set out the facts. There's been a general denial.

Trial Examiner: It is up to you to prove the pleadings of your complaint.

Mr. Grodsky: All right.

Q. (By Mr. Grodsky): Do you have occasions when persons who [27] are not members of your local come to the union office seeking employment?

A. Yes.

Q. How are those people handled, what is done?

A. They make out an application card.

Q. Application for what?

A. Well, they put down their, the, well, their name, their address, telephone number and their, what they think they are qualified to operate.

Q. And what is done with that card?

A. That is put in a separate file.

(Testimony of Harold M. McNeel.)

Q. Is there a single file of all of these application cards or are there two or more separate files?

A. Of those?

Q. Yes. A. Just one.

Q. Is there any distinction made between members of other locals of Operating Engineers and applicants who are not members of any local of Operating Engineers?

A. I don't understand that.

Mr. Grodsky: Will you read the question, please.
(The question was read.)

Mr. Sokol: Will you hear the question again?

Trial Examiner: All right, read the question again, please. [28]

(The question was read.)

Mr. Grodsky: I withdraw the question.

Q. (By Mr. Grodsky): Is there any distinction made between applications which are made by members of other locals of the Operating Engineers and applications made by persons who are not members of any local of the International Union?

Trial Examiner: In regard to what?

Mr. Grodsky: In regard to where they are put and how they are handled.

The Witness: Well, you are speaking——

Mr. Sokol: If you know.

The Witness: Yes, well, I only know this that on the same out-of-work list there are the applicants and transfers of what you are speaking about.

Q. (By Mr. Grodsky): Now, are they treated together, one group, applicants and transfers?

(Testimony of Harold M. McNeel.)

A. Transfers are on the out-of-work list headed that way.

Q. And are applicants on another section of the out-of-work list?

A. Applicants, you mean the non-union applicants?

Q. Yes. A. That is a separate file.

Q. In other words, your out of work list, as I understand it now and correct me if I'm wrong, is headed with your members and then below your members is another group which is headed [29] transfers? A. Not below them, no.

Mr. Sokol: All in one?

The Witness: All, the heading is the same but they are not below because if they can't find a man on this list they go on down and it's all tied in, all printed on the same list.

Q. (By Mr. Grodsky): Well, in selecting——

Mr. Sokol: If I understand it, it's Applicants and Others?

The Witness: Yes, Applicants and Others is the way it's headed and then we have oilers and firemen and all groups are headed——

Mr. Sokol: May we have a recess?

Trial Examiner: Yes, we will take a five-minute recess.

(Short recess taken.)

Trial Examiner: I will call the hearing to order. All right, Mr. Grodsky.

Q. (By Mr. Grodsky): How often are these lists revised, the out-of-work list?

(Testimony of Harold M. McNeel.)

A. Well, they are revised every week.

Q. And did I understand your last answer before I recessed to be that there is a single list, a single out-of-work list which lists both the members and applicants and others?

A. Yes. But the difference there, there's a difference between the Applicants and Others list and the so-called information list because there is a provision in the National [30] Labor Agreement that the men, called, I believe, a seniority clause, where they must have worked within the employer unit within the last ten years so the Applicants and Others and the information cards are set aside for that reason. They did not qualify for work within the employer unit under the master labor agreement.

Mr. Sokol: You mean don't qualify for work?

The Witness: I mean to be sent out, they can be sent out.

Mr. Sokol: In order?

The Witness: Sent out in order but they do not qualify in the seniority provision.

Mr. Sokol: So we may have that clear, are you talking about the subdivision (a) on the second page of the exhibit which refers to the first preference going to "workmen who have been recently laid off or terminated in that respective local union's work and area jurisdiction by the contractors now desiring to reemploy the same workmen in that same area provided they are available for employment"?

(Testimony of Harold M. McNeel.)

The Witness: The one I had reference to, ten year provision.

Mr. Sokol: (b) is the one you were talking about, (b) workmen who have been employed by contractors in the respective local union's work and area jurisdiction within the multiple-unit during the previous ten years and are available for employment.

In other words, they don't fit that particular category?

The Witness: No.

Q. (By Mr. Grodsky): Now, I'm more confused than ever and I must confess it. Let's get this straight. Is there one list of out-of-work or more than one list of out-of-work?

A. One list, one list, all on the same list.

Q. And where does this ten year provision that you are talking about get on to the list or how is reference made to it on the list, in what way?

Mr. Sokol: Excuse me, that wasn't his testimony. There is no reference made to the ten year provision on the list. I think he testified that at first. Your question is ambiguous and I don't want to object and take up time.

As I understand it is the first people on the list. the first heading is what?

The Witness: Local 12.

Mr. Grodsky: I'm going to object.

Trial Examiner: All right, go ahead, Mr. Grodsky.

Mr. Grodsky: Let me try and get it without leading questions on either side.

(Testimony of Harold M. McNeel.)

Trial Examiner: All right, go ahead.

Mr. Grodsky: I had a pending question. I will withdraw it.

Q. (By Mr. Grodsky): Mr. McNeel, you don't happen to have here a copy of that out-of-work list? [32] A. No.

Q. The out-of-work list is headed in what fashion? A. Just that, out-of-work list.

Q. And then is there any description under that before you start with names?

A. Just what we call Local 12, the parent body.

Q. Local 12, and under Local 12 are listed the members of Local 12 who have reported that they are out of work? A. Right.

Q. And they are listed there in accordance with the time that they have been out of work, the ones who have longest been out of work are at the top of that list? A. Right.

Mr. Sokol: Now, I can help you.

Mr. Grodsky: It's all right. Let me help myself.

Q. (By Mr. Grodsky): And after all of the people who are members of Local 12 are listed on that list, then you have below that on the same sheet of paper another listing of names, is that correct? A. Right.

Q. And is there another heading there?

A. Yes.

Q. And that other heading reads what?

A. Applicants and Others.

Q. Applicants and Others. And that includes persons who [33] have submitted application cards?

(Testimony of Harold M. McNeel.)

A. Yes, others, too.

Q. I was going to get to that others. What others are there who are listed there?

A. Well, there are transfers in some other locals.

Q. Anybody else?

A. And, no, that covers the, and applicants, of course.

Q. Now, is there any distinction in the listing on that list as between the transfers and as between the applicants? A. No.

Q. In other words, it's a first come, first serve basis?

A. Correct, with the exception of the seniority provision that I mentioned because they don't qualify for that.

Q. Now, how does that seniority provision play a role, first of all, does it play a role in the listing of men in the Local 12 category?

A. Not in—I don't understand that question.

Q. Well, you have two categories there, Local 12 and Applicants and Others? A. Yes.

Q. In the Local 12 category, your ten years provision has no effect?

A. Just the opposite.

Mr. Sokol: Just the opposite.

Q. (By Mr. Grodsky): Is the listing of employees in the [34] Local 12 group, now, in any sense, does it deviate in any way from the fact that the man who has reported out of work goes on the bottom of the list and he works his way up, is there any deviation from that?

(Testimony of Harold M. McNeel.)

A. Yes, yes, there's considerable deviation from that. First of all, a contractor calls in for a specific man and he is on the bottom of the list, he gets him.

Q. He gets the man on the bottom of the list if that is the man he asked for by name?

A. Asks for by name.

Q. If he asks for a man on the Applicants and Others list, would he get him if you have men in your Local 12 of the same qualifications on the out-of-work list?

A. That, I couldn't answer that question. I don't know, in fact, I don't know of that ever happening so I couldn't answer that.

Q. All right. Now, then, there's another exception, also, that if a man has worked on the job for three days or less and he comes back and reports out of work, he takes his old place in line again, is that correct? A. That is correct.

Q. Now, apart from those two exceptions, do you know of any other deviation from the rule that a man reporting out of work, a Local 12 member goes to the bottom of the list and works his way up? [35]

A. Oh, yes, as far as classification is concerned, quite a difference. For example, supposing the blade man, for example, and the request comes in for a blade man. He might be on the bottom of the list. He goes.

Q. He'd be the first top man of blade men?

A. No.

(Testimony of Harold M. McNeel.)

Q. Supposing you had three men listed as blade men?

A. The one who was on the out-of-work list prior to the other two would be the man who was sent to the job. But if there was no one on there excepting this one man that just reported in, he would be sent to the job.

Q. Naturally. A. Unless you——

Q. That is no deviation at all because it's not an exception to the rule that the man who is out of work the longest in that classification gets the job. Is it an exception to that rule? A. Yes.

Q. I'm asking if there are any other exceptions to that rule.

A. No, not that I know of.

Q. You testified extensively here through counsel about a provision involving ten year seniority. Now, what effect does that have with reference to your out-of-work list?

A. Well, it's altogether possible that a man might report in that had not worked in the multiple employer unit, and his [36] card might show that now he would be, remain there until the job was filled by those who were, had been employed in the multiple employer unit, in other words, under the master labor agreement.

Mr. Grodsky: Will you read that answer, please?

(The answer was read.)

Q. (By Mr. Grodsky): In other words, this is a situation where a man who is a member of Local 12 has not worked in the territorial jurisdiction of

(Testimony of Harold M. McNeel.)

Local 12 for the past ten years, that would be a preliminary situation? A. No.

Q. How could the situation arise?

A. A man may have been working for some one contractor, or, many different examples you could give that where a man might not be working under the AGC agreement, he might not be working under that. So he, he's laid off or the job is completed and he puts his name on the out-of-work list but he doesn't go to work under his classification until the men at the top, above him of the same classification who had worked within the employer unit.

Mr. Sokol: Within the multiple employer unit?

The Witness: Yes, within the multiple employer unit so he would stay status quo until the rest of them——

Mr. Sokol: The only reason I interject, sometimes you leave out a word to complete your sentence, you know, so that [37] it's clear. Now, I know you know how to express yourself very clearly and so that this record be clear, take your time and complete the sentence fully.

Trial Examiner: In other words, as I get your answer, Mr. McNeel, there may be possibilities where a member of Local 12 has been working for some of these other initialed companies other than the AGC for a period of ten years?

The Witness: That's right.

Trial Examiner: I see. All right.

Q. (By Mr. Grodsky): Now, when that man

(Testimony of Harold M. McNeel.)

reports his name would be put on the Local 12 list, is that correct? A. That is correct.

Q. It would be put on the bottom of that list, is that correct? A. That's correct.

Q. Would there be any notation to indicate that he would be treated differently than anyone else on that list?

A. Nothing on the list to indicate it.

Q. Then, as time goes on and as men above him are removed for employment, his name goes up on that list? A. Yes.

Q. Now, in due course, his name would reach the top of the list? A. That is correct.

Q. And at that time there will be other men below him on the [38] list, presumably who have worked for contractors within the ten year period, is that correct? A. That is correct.

Q. Now, is there any way, any check made to make sure that he is not dispatched first before these other people?

A. Well, of course, that could be easily done—I couldn't answer as to that, that particular phase of it, I don't know.

Q. Who is the person who is directly in charge of that phase of the operations of Local 12?

A. Carroll, William C. Carroll.

Q. Does Mr. Carroll also have charge of these application cards which persons fill out who come and ask for employment?

A. Dispatching, he is in charge of all the dispatching which covers all phases of dispatching.

(Testimony of Harold M. McNeel.)

Q. Which includes the initial interview of persons seeking employment? A. Yes.

Trial Examiner: He would be known as your dispatcher, then?

The Witness: Well, he's known as dispatcher but not officially.

Q. (By Mr. Grodsky): He is an elected official of the local?

A. That is correct, financial secretary.

Q. Financial secretary? A. Yes. [39]

* * * * *

ROBERT A. HOLDERBY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: State your full name and spell the last name, please.

The Witness: Robert A. Holderby, H-o-l-d-e-r-b-y.

Q. (By Mr. Grodsky): Mr. Holderby, when did you become a member of Local 12? [50]

A. November, 1952.

Q. And before that time——

Mr. Sokol: I respectfully submit, I don't want to presume to be obstreperous by objecting but I believe that the membership card would be the best evidence of his membership and the date of membership if he has it.

Trial Examiner: I overrule the objection.

(Testimony of Robert A. Holderby.)

Q. (By Mr. Grodsky): Before that time, did you make an application for membership?

A. I had.

Q. Now, when you first went, where did you go to make such application?

A. My first effort to join the union was I visited with Mr. Groom, one of the officers of the union. I asked him the procedure as to how I could become a member of the union. He is the treasurer.

Q. Joe Groom is the treasurer?

A. Joseph Groom, yes.

Q. Were you given an application to fill out at that time?

A. The first card was an information card. The second was the regular application for membership.

Q. Now, you filled out the information card, is that similar to the cards that Mr. McNeel was testifying about this morning?

A. Yes, sir.

Q. And on that information card is there a place upon which [51] you note the type of work that you are qualified to do?

Mr. Sokol: Objected to as calling for a conclusion of the witness.

Trial Examiner: Maybe Mr. Sokol will supply you with a copy of the card.

Mr. Sokol: I will certainly try to get it. I don't have it in my file here but I will make a note of it here and get one.

Q. (By Mr. Grodsky): Will you state, Mr. Holderby, what information you put on the information card?

(Testimony of Robert A. Holderby.)

A. If my memory serves me accurately, my application was for the oiler or apprentice to the operating engineers.

Q. Did you at any time after that fill out any other information card or cards?

A. I believe I did when I made re-application for membership in the parent local, Local 12 as journeyman.

Q. As an oiler, you were a member of a subordinate local?

A. That's right. That would be designated as 12-A.

Q. When you made application for membership in Local 12 and filled out an information card, what information did you put on that information card?

A. Again, if recollection serves me accurately, it said, it noted Barber Greene, G-r-e-e-n-e asphalt spreading machine, then rollers, tandem rollers and what they refer to as three legged roller and cat skinner. [52]

Q. Anything else that you recall?

A. No. Subsequent to that, however, I have added to that list other pieces of machinery, or other pieces of equipment.

Q. When you say you have added to it, to the list, what procedure do you follow?

A. In the past, the policy has been to add, if I may cite this, I use this as an example, I was having trouble with my feet so I had to have the type of equipment where I wouldn't be standing. So I requested that I be considered for a tiger or hoist-

(Testimony of Robert A. Holderby.)

ing equipment, just to put my name on that particular classification.

Q. Those are classifications in addition to which you had originally shown? A. Yes.

Q. Now, my question is going to be, what procedure did you use in order to get these additional qualifications listed on your information card?

A. I merely requested the girl at the wicket to add that to my card, to flag it as such.

Q. Do you know whether that was done?

A. To my knowledge, it was.

Mr. Sokol: I move to strike that as a conclusion of the witness. He couldn't possibly know that.

Mr. Grodsky: Wait a minute. Let's find out.

The Witness: Yes, I can. I assume it—— [53]

Trial Examiner: We will hear the testimony.

The Witness: I have seen on the card written "tugger," t-u-g-g-e-r, that is in pencil, I believe.

Q. (By Mr. Grodsky): Have you ever been sent out on any jobs involving these additional classifications which you have requested to be added?

A. No, not on that specific piece of equipment. I can explain something that occurred the summer that qualified me indirectly for another piece of equipment.

Mr. Sokol: There is no question pending.

Mr. Grodsky: There will be in a second.

Mr. Sokol: Let's proceed without having the witness lead it.

Trial Examiner: All right, let's go, Mr. Grodsky.

(Testimony of Robert A. Holderby.)

Q. (By Mr. Grodsky): In connection with any of the equipment which you have listed on your information sheet, did you appear before any board to pass upon your qualifications?

A. Never. Excuse me, may we make a retraction on one piece of equipment, that was on a frame on which I made requests. They sent me out on a frame which had never been noted on my card. So I was referred to a job as a frame operator.

Mr. Sokol: But you went before the board?

The Witness: I did not.

Mr. Sokol: I can't understand that.

Trial Examiner: He did not go before a board.

The Witness: I have never been before a board.

Q. (By Mr. Grodsky): But, as I understand your last answer, you were sent out as a frame operator at the time when your card never showed that qualification?

A. That is correct. I believe the specific date was March of 1953.

Q. Subsequent to your having been accepted into membership for the union, did there come a time when you were suspended for non-payment of dues? A. Yes.

Q. And do you recall the date?

A. I believe the date was the forepart of January, 1954. That was the date of notification, if I remember correctly. However, I could very quickly go through my briefcase and find the date.

Q. Now, if it becomes material we will get that specific date.

(Testimony of Robert A. Holderby.)

Mr. Grodsky: The information I have here, counsel, is that it was January 31. It would come at the end of the month, naturally, January 31 of '53.

Q. (By Mr. Grodsky): Subsequent to that time did you make an effort to be reinstated in the union? A. Yes.

Q. And did you receive any word from the union with reference to reinstatement? [55]

A. Yes.

Q. Was that letter subsequently incorporated in a complaint for declaratory relief filed by your attorney? A. Yes, it was.

Q. And you read that complaint?

A. I did.

Q. At the time that it was filed? A. I did.

Q. And you checked that letter against the complaint? A. I did.

Mr. Grodsky: I have had marked as General Counsel's 6 for identification the complaint filed, and this copy does not have a number, filed by Mr. Holderby against Local 12 and several other defendants who are all officers of Local 12 by Aaron Sapiro, who is the attorney for plaintiff.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 6 for identification.)

Mr. Sokol: You are offering the complaint?

Mr. Grodsky: I'm offering the complaint.

Mr. Sokol: I will not object to this being a true copy.

(Testimony of Robert A. Holderby.)

Tria Examiner: All right.

Mr. Sokol: I just want to look at it for the relevance and, for that reason, on the record, could I have from Mr. Grodsky an expression of what the relevance of this thing is?

Mr. Grodsky: Well, there are two items, two letters in [56] there which are set out in full. One is the letter of March 17, or 18, which counsel is looking at now and, subsequently, a letter from the union, dated June 8, 1953, which letters form the basis for a declaratory judgment action. I am offering the entire document plus the court's ruling in that case of which I have two copies because they do have a functional connection with the balance of this proceeding.

Mr. Sokol: What does this tend to prove or disprove, the two letters?

Mr. Grodsky: The two letters, well, the first letter indicates certain circumstances in which he will be reinstated into membership. The testimony of the witness will be that——

Mr. Sokol: Oh, I see.

Mr. Grodsky: ——that he was treated as a member during that period and, subsequent to the second letter, he was no longer treated as a member for job referral purposes.

Mr. Sokol: You know that this is a true copy, yourself? I think the Board has a copy.

Mr. Grodsky: I have not examined it against the original but if you want me to, I will be glad to do that. I take it from their file.

(Testimony of Robert A. Holderby.)

Mr. Sokol: All right. Just give me a moment.

Trial Examiner: We will go off the record.

(Discussion off the record.)

Trial Examiner: On the record. All right, Mr. Sokol? [57]

Mr. Sokol: With respect to the proffered document, I have no objection on the ground it is not a true copy of the original on file in the court but I do object on the grounds it is immaterial in these proceedings.

Mr. Grodsky: Now, I have explained to the Examiner and Mr. Sokol already in my statement that appears on the record as to why I deem the entire document material. Now, as to lack of proper foundation with reference to the two letters with which I'm concerned at this juncture of the proceeding, I think I can clear that up through the witness if I may.

Trial Examiner: All right, clear that up.

Q. (By Mr. Grodsky): Mr. Holderby, you have seen the original of these two letters, the letter of March and letter of June to you? A. Yes.

Q. Do you know where those two originals are at this time?

A. I believe those two originals are in the District Court of Appeals.

Mr. Sokol: In other words, this case which was in the Superior Court of the State of California, in and for the County of Los Angeles is now on appeal in the District Court of Appeals in the State of California?

(Testimony of Robert A. Holderby.)

The Witness: That is correct.

Mr. Sokol: And those two letters which were exhibits in that case are with the records of the case in the District [58] Court of Appeal?

The Witness: That is correct.

Q. (By Mr. Grodsky): And the words of the two letters are exactly copied in the complaint, is that correct? A. Yes, sir.

Q. So that where the two letters are set forth in the complaint, they are exactly the same as the letters which are in the Appeals record?

A. Yes.

Mr. Grodsky: I will now offer the document.

Trial Examiner: I think now the letters are certainly admissible as set forth in the complaint. I don't know whether there is any materiality to the complaint or not. I haven't seen it. I better take a look at it.

Maybe you could tell me, Mr. Grodsky, why this complaint is admissible as of now in this case.

Mr. Grodsky: Well, I will make one more statement for the record that the witness was given judgment in the lower court and the court directed that he be reinstated in the union. The witness further will testify that when after the date of the letter of June 8, 1953, he was removed from the Local 12 out-of-work list and put in the out-of-work list of Applicants and Others and that he has remained there to this date.

Trial Examiner: That doesn't show why the complaint [59] itself is material. I think that as of

(Testimony of Robert A. Holderby.)

now the two letters are material but I don't think the complaint is material. I will sustain the objection to the complaint while admitting the two letters in evidence.

(The document heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

Mr. Grodsky: I propose a stipulation to counsel that under date of February 3, 1954, Holderby was——

Mr. Sokol: I will stipulate that this is a true copy of minutes of the court.

Mr. Grodsky: Shall I offer it as minutes of the court?

Mr. Sokol: That is what it is, that is all it is.

Mr. Grodsky: I thought we'd just stipulate to the conclusion.

All right, then I will offer—I have had marked as General Counsel's 7 a photostatic copy of the minutes of the court, Superior Court, Los Angeles County, and I'm offering it in evidence.

Trial Examiner: Any objection to that?

Mr. Sokol: No.

Trial Examiner: It may be admitted.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 7 and was received in evidence.)

Trial Examiner: If that is to become intelligible at all, I guess my ruling on the complaint is wrong.

Mr. Sokol: Well, I was think that, in a sense, I was going to urge that the Board doesn't have jur-

(Testimony of Robert A. Holderby.)

isdiction as I alleged in my answer and it might be germane there to have the complaint in. You see, my position is that the State Court took jurisdiction on the ground that no commerce was involved and he recovered judgment in the State Court for this very precise thing that we are confronted with here.

Trial Examiner: I see. Well, I will reverse myself on the complaint and allow that in evidence.

Mr. Grodsky: Mr. Examiner, in connection with the complaint, I only have a single copy of that and I'm wondering if it would be practical to request you to waive the duplicate of the complaint?

Trial Examiner: I don't think so, I think you better get a duplicate just as everybody else has to.

Mr. Grodsky: All right.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Grodsky): Were there any period of time when you had registered for employment with Local 12? A. Yes.

Q. And during those periods, do you know what list your name was put?

Mr. Sokol: Objected to as calling for the conclusion of [61] the witness.

Trial Examiner: If he knows he may answer.

Q. (By Mr. Grodsky): Just answer yes or no.

A. Yes.

(Testimony of Robert A. Holderby.)

Q. How do you know on what list your name was put?

A. I saw with my own eyes the name, Robert A. Holderby, on the membership list of Local 12, journeyman classification.

Q. Now, at that time in question, was there a single list on which there were listed members of Local 12 and, under that, Applicants and Others?

A. I saw two lists, one for 12, or, I should put it, members of the International Union of Operating Engineers which would be, apparently, 12; 12-D, which are the survey part of the International Union of Operating Engineers; the other list was limited to Applicants and Others which included the transfers.

Trial Examiner: Now, all of you gentlemen are talking about these out-of-work lists, are you?

Mr. Grodsky: That is correct.

Q. (By Mr. Grodsky): In other words, Mr. Holderby, there is one list?

Mr. Sokol: Why repeat his testimony? He has testified——

Mr. Grodsky: I'm trying to clarify.

Mr. Sokol: I think he testified very clearly.

Mr. Grodsky: Good, I'm happy to hear that.

Q. (By Mr. Grodsky): And during the period in question which is between March and June of 1953, you observed that your name appeared on the list of members? A. Yes.

Q. Now, did there come a time after June of

(Testimony of Robert A. Holderby.)

1953 when your name no longer appeared on that list? A. Yes.

Q. When did that take place?

A. The following list of June 8, 1953.

Q. And what list did your name appear at that time?

A. The Applicants and Others list.

Q. Did you discuss that with anyone?

A. At the time, the particular time after June of '53 when I came in to put myself on the out-of-work list, I was given another information card by one of the girls of whom I don't remember her name, gave me the card and I said, "What am I to do with this?"

And she said, "Fill it out."

And by that, there was an implication that I no longer was going to work for Local 12.

Mr. Sokol: I have to move to strike the latter part.

Trial Examiner: I will allow to strike the last part of that answer, the implication.

Q. (By Mr. Grodsky): Mr. Holderby, did you at that time or any subsequent time ever discuss with any representative of [63] Local 12 where your name should be, whether on the members or Applicants and Others list?

A. No, I don't, I can't say that I did. I did query several times as to whether my name was—the list was posted and after the date of July, 1953, my name remained at the top of Applicants and Others list until June of 1954.

(Testimony of Robert A. Holderby.)

Q. Now, prior to the time that your name was on the Applicants and Others list, what was the situation with reference to job referrals? How many job referrals did you have, or estimate it in some fashion?

A. Would you read that, I didn't get the latter part of that question.

Trial Examiner: Let the reporter read it.

(The question was read.)

The Witness: Did you say from the time I received the first letter, the letter of March, ordering reinstatement? I believe you have a list that would be more valid than my recollection.

Mr. Grodsky: May we be off the record?

Trial Examiner: All right, we will go off the record.

(Discussion off the record.)

Trial Examiner: I will call the hearing to order, please.

Mr. Grodsky: I have shown the witness General Counsel's 8 and he has examined it and I will now offer General Counsel's 8 [64] in evidence.

Mr. Sokol: No objection.

Mr. Grodsky: And since it has an original and has some written material, I will ask whether the Examiner will waive a copy as I can have it photostated.

Trial Examiner: You better have it photostated. I understand that is a letter from the union and is being admitted as admission——

Mr. Grodsky: Part of a letter and has the

(Testimony of Robert A. Holderby.)

working record of Robert A. Holderby from 9-29-51 to 8-20-53.

Trial Examiner: There being no objection, it will be admitted in evidence.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 8 and was received in evidence.

[See pages 157-160.]

Q. (By Mr. Grodsky): In examining this, I notice on June 9, 1953, it indicates that you were referred to G. J. Payne, P-a-y-n-e, and the next notation is on the same date, 6-9-53, and indicates R.I. meaning reported in.

Will you tell us how long you worked for G. J. Payne?

A. I worked for G. J. Payne for the approximate period of 15 days. I was not actually employed by G. J. Payne. It was a piece of equipment owned by G. J. Payne and was referred by the union but I was actually working for the County of Los Angeles.

Mr. Sokol: Wait, before you go any further, I think the [65] Trial Examiner would like to know. Is he challenging the authenticity of this record?

The Witness: Yes.

Mr. Grodsky: Only insofar as that appears to be a clerical error there. It is quite obvious if he is sent out on a job he wouldn't report in on the same day.

Mr. Sokol: Oh, yes, it would be. If he is challenging it, it goes to credibility. We will produce

(Testimony of Robert A. Holderby.)

evidence this is a true record. We wouldn't give you any inaccurate record on that.

Mr. Grodsky: I wouldn't expect you would deliberately give us an inaccurate record.

Q. (By Mr. Grodsky): When was it after you were first sent on the G. J. Payne job that you reported in for work?

A. May I make, give an explanation of what led up to that particular job referral?

Q. No, it's not asked for. Just tell us when was it after the G. J. Payne job that you reported back in as available for employment?

A. I believe it was the latter part of June because I worked on that particular job for a period of approximately 15 days as previously stated.

Q. Now, after the G. J. Payne job, when is the next time after that you received a work referral from the union?

A. I was given a work referral for part of July, 1953, which [66] was canceled. And that was the last referral that I got from the Operating Engineers Local 12 until June of 1954.

Q. During the period of July of 1953 to June of 1954, did you have occasion to visit the offices of Local 12? A. Yes.

Q. On one or more than one occasion?

A. Many occasions.

Q. And on any of these occasions did you ever inquire as to your status of job application?

A. I did.

(Testimony of Robert A. Holderby.)

Q. And from whom did you inquire?

A. The girl at the window. After the time, after I believe, it was January of 1954 when the work lists were taken away from, for public exhibit.

Q. Now, between June of 1953 and January of 1954, is it your testimony that the out-of-work lists were available for people to see?

A. Up until approximately January, I believe, 1954, the work lists were available for the general membership to see, were posted in a case, a glass enclosed case.

Then, after, I believe, January of '54, the out-of-work lists were taken down and, if you wished to find out your status on the out-of-work list, you had to make a personal request from the girl behind the window.

Q. During the period before January of '54, did you have [67] occasion on one or more than one occasion to see what your position was on the out-of-work list? A. I did, yes.

Q. Will you describe where your name appeared on the out-of-work list?

A. Approximately in the middle part of July, I believe, until the last time that I saw it posted, my name was at the top of the Applicants and Others list and remained there, to my knowledge, until June of 1954.

Q. After January of 1954 when the lists were removed, did you make any inquiry as to where your name was? A. Yes, I did.

Q. From whom did you make such inquiry?

(Testimony of Robert A. Holderby.)

A. The inquiries were requested of the girl behind the wicket.

Q. When you would make such inquiry, what would she show you?

A. She would merely refer or state, "You are still at the top of the Applicants and Others list."

Q. During the entire period in question when you testified your name was at the top of the Applicants and Others list, did you have any job referrals between, say, the middle of July, 1953, and the first of June of 1954?

A. As I stated on the copy admitted as evidence, there were two calls that were made both of which I was not available. I was not at home when the calls were made. However, on one, [68] when I did call back, the union, and they asked me if I wanted to go out on a Barber Green, I believe that was in August of '53, and I stated at the time, no, that I didn't want the job because of physical infirmity of my foot. I was physically unable at that particular date.

Q. Did you have any other inquiries about jobs from the union, or referrals?

A. No, that was the last one until June of '54.

Q. Do you know what list you are on now with reference to the out-of-work lists?

A. No, I don't. I do know this——

Mr. Sokol: Wait now, that is a voluntary answer. I don't think we should clutter up this record. I'm going to have enough cross examination as it is.

(Testimony of Robert A. Holderby.)

Trial Examiner: I think he is entitled to tell us his story.

Mr. Sokol: It was a voluntary answer. No question pending.

Mr. Grodsky: He was simply going to elaborate.

Trial Examiner: As I understand, if this is an elaboration of the last answer, you may proceed.

The Witness: In the past three weeks, three to date tomorrow, I have been on the out-of-work list. In that period of time I have sat in the hall innumerable days waiting for job referrals. Men have come in that have been [69] on application or have been transferring from other unions that have been slated to go out or have been referred to other jobs over and above me. They have been going around——

Mr. Sokol: Move to strike all of that as a conclusion of the witness.

Trial Examiner: I'm going to allow that motion because the question is what list he was on.

Mr. Grodsky: That's right.

Q. (By Mr. Grodsky): After June of '54, did your situation with reference to job referral change? A. Most dramatically.

Q. Will you explain in what way it changed?

A. The date, specifically, alludes me but it was the fore part of June, 1954, I was finally referred to a job for Ball & Harms in Palmdale, California, operating a W.D. 10 pulling a wobbly wheel roller. Then, shortly after that, I was referred to another

(Testimony of Robert A. Holderby.)

job as an oiler for Macco Corporation on a Manitowak crane.

The first job lasted six days, the second job lasted approximately five weeks. After that I was again referred to another job for McDonald & Cruse and, the interesting part of this particular job was, I was scheduled to go on a screed. I was a screed operator but there was a confusion. They thought at the hall when they dispatched me that it was black top or asphalt screed work. Upon arriving at the job, I realized [70] that it was not black top I was going to work with but it was concrete. It was a concrete spread. I asked the superintendent, inasmuch as I traveled a distance of some 20 miles, that if I could make an attempt to break in on the equipment because I had never operated this particular piece of equipment before but I had seen it in operation and he said, "Yes, go ahead."

So he gave me the opportunity and I worked that until they finished the particular spread that I was on and then I was transferred to two other jobs on that particular job.

That job terminated. I was sent out for a day and a half to Schroeder Company, an asphalt paving company. I worked there for approximately a period of five weeks until the job terminated three weeks ago tomorrow. That was the last referral I was made.

Q. Between the period of June of '54 and three weeks ago, how long a waiting period did you have between jobs?

(Testimony of Robert A. Holderby.)

A. Relatively short. However, I believe there was, the longest period was approximately a week. This is an approximate guess, now.

Mr. Grodsky: No further questions.

Cross Examination

Q. (By Mr. Sokol): Mr. Holderby, how old are you? A. 30.

Q. From your distinguished language that you used on the witness stand, I presume that you are a college graduate? [71]

A. I have college background, yes.

Q. And actually, you had never intended to follow the work of the Operating Engineers prior to coming to Los Angeles?

A. That I believe is an assumption on your part.

Q. All right, might be erroneous but let's go on. When did you arrive in Los Angeles?

A. Approximately 1933.

Q. And what kind of work did you do then?

A. I was a student, 1933.

Q. Well, I'm an old timer. Because, that was the height of the depression.

When did you stop being a student in college, so to speak, or high school or whatever you went to?

A. I was a student relatively up until 1950, with a fraction of time.

Q. I see. I have to be more specific. You were going to school in 1933. What kind of school?

A. Grammar school.

(Testimony of Robert A. Holderby.)

Q. I see. Then you went to high school, I presume?

A. During high school——

Q. About when did you get out of high school?

A. 1940.

Q. Did you go to college?

A. Glendale City College. Then I went in the Service.

Q. Then you went in the Service. When did you get out? [72] A. '46.

Q. What did you do then?

A. I went to the University of Illinois.

Q. When did you get out of there?

A. '48.

Q. Then what did you do?

A. University of California of Los Angeles, '48 to '50.

Q. 1950, oh, yes, 1950. Did you go down to the Engineers?

A. I have been in construction work.

Q. You answer my question. In 1950 what work did you go on?

A. I was working in the construction field.

Q. For whom?

A. Ellis Construction Company.

Q. What were you doing for Ellis?

A. I was doing a little bit of everything.

Q. All right, what did you do?

A. I have done oiling, even prior to that, many, many years prior to that. Dates back.

Q. What did you do for Ellis?

(Testimony of Robert A. Holderby.)

A. I had oiled, I had operated some, I had worked in the office.

Q. Doing paper work? A. Yes, sir.

Q. Were you a member of the Engineers Union when you were an oiler down at Ellis Company?

A. I had made an application for oilers in 1948 when working summers.

Q. But you didn't complete that?

A. No, because I went back to school.

Q. When you worked for Ellis, were you a member of the Engineers Union? A. No.

Q. You knew Ellis was signed to a union agreement? A. Yes.

Q. What union were you a member of on that job? A. I was not.

Q. How long did you work for Ellis?

A. Well, if you stretch it over a period of years, since approximately '39.

Q. Steadily, I don't get—

A. I have worked, this fellow Ellis is a personal friend of mine. I worked for his father when I was a youngster starting about '39.

Q. Since 1950 you have worked for Ellis how long? A. For periods of time.

Q. Off and on? A. Yes.

Q. Do you mean to say you could go to work for Ellis at any time, more or less?

A. I had in the past, yes.

Q. I see. [74]

A. I was working on and off while going to school from '48 to '50.

(Testimony of Robert A. Holderby.)

Q. Off and on, in these periods when you were not sent out by the Engineers Local 12, could you have gone to work for Ellis?

A. When is this, now?

Q. In '53 and '54 when you didn't have jobs assigned through Local 12, you could have gone to work for Ellis?

A. I don't know, I never made a request.

Q. You never attempted? A. No.

Q. I see. Ellis, is he in the same business?

A. He's a contractor.

Q. A contractor handling all this kind of stuff, screeds and caterpillars, all that kind of work that engineers have? A. Yes.

Q. And now, to get down to the chronology, in 1950 you worked for Ellis, and when did you cease in 1950 working for Ellis? A. August.

Q. And during that time you did paper work in the office and some oiling?

A. That particular year it had been mostly office work. I did a little bit of laboring.

Q. Then in 1951, what did you do? [75]

A. I went to work for Ellis again in the office.

Q. All right, in 1952 what did you do?

A. That was a period of time that I was working in the field as operating engineer.

Q. For whom?

A. Various contractors as listed on the work record.

Q. I see. Now, the only work that you have done in the field of the jurisdiction of Operating

(Testimony of Robert A. Holderby.)

Engineers Union in that particular kind of work is reflected on that Exhibit 8, is that right?

A. With the exception of doby money that I paid in 1948 or permit money.

Q. All right, you have answered the question. I want to come down to the crux of this thing.

Mr. Sokol: I think the main period is from August of '53 to some date in '54 that he claims he wasn't referred out. What is that period?

Trial Examiner: June of '54.

Q. (By Mr. Sokol): June of '54. During that period you were working for an organization called Democracy for Labor Unions, isn't that true?

A. I was not working for it, no.

Q. Weren't you selling memberships in that organization?

A. I was not selling memberships.

Q. Did you receive any money from that organization? [76] A. No, no.

Q. Did you receive any remuneration of any kind—— A. No.

Q. ——wait, you haven't heard my question. You are way ahead of me.

Listen, between August of '53 and June of '54, did you receive remuneration from anyone for work? A. No—wait, let's go back.

Q. You answered the question.

A. Wait, now, did you say——

Trial Examiner: August of 1953 to June of 1954.

The Witness: Yes, I have to retract and say,

(Testimony of Robert A. Holderby.)

yes, I did. I was trying to sell trucks for a period of time.

Q. (By Mr. Sokol): Well, we got that much. Who were you selling trucks for?

Mr. Grodsky: I'm going to object to that if the Examiner please, I don't see the materiality to anything in this.

Mr. Sokol: It goes to our defense definitely. I don't want to reveal our whole case at this time. We are going into his work record. You went into it and I'm showing between August of '53 and June of '54 what work he was doing.

Trial Examiner: I can see how it can possibly be material. I will overrule the objection.

Q. (By Mr. Sokol): What concern was that for?

A. Two, one, Courtesy Chevrolet and the other was Midway [77] Motors.

Q. Courtesy Chevrolet is located where?

A. Corner of Ninth and Western.

Q. When did you go to work for Courtesy Chevrolet?

A. Approximately September—wait——

Q. Got to be exact, try to be exact.

A. I'm trying to be exact.

Q. All right.

A. Approximately, I would say, August, it was in August of '53.

Q. All right, in August of '53, you went out to Courtesy Chevrolet and who did you talk to out there? A. Specifically?

(Testimony of Robert A. Holderby.)

Q. Yes.

A. I talked to Ed Fitzgerald and Bob Hamilton, the manager and assistant manager.

Q. Did Hamilton hire you? A. Yes.

Q. What did you do there?

A. I was selling.

Q. Selling automobiles on the floor?

A. No, I didn't take any floor time.

Q. You were on the used car lot? A. No.

Q. What——

A. New cars but I was hustling my own, I didn't sell on [78] floor time.

Q. So you took a job?

A. Well, commission.

Q. And Mr. Hamilton was your superior?

A. Yes.

Q. And you worked how long for Courtesy Chevrolet?

A. I would say latter part of October.

Q. Could it have been later than that?

A. I don't believe so.

Q. Just the latter part of October of '53?

A. Yes.

Q. And why did you leave that employment?

A. I was fired because I didn't sell any cars and trucks.

Q. During that time, you didn't go down to the union hall? A. Oh, yes——

Q. Who did you——

Mr. Grodsky: Please wait until he finishes his questions.

(Testimony of Robert A. Holderby.)

Q. (By Mr. Sokol): You went down to the union hall? A. Yes.

Q. Who did you talk to between August of '53 and the latter part of October of '53 about any work at the union hall?

A. I talked at the window. I had gone down there.

Q. Who did you talk to at the window?

A. Specifically, there are many girls who are at the window and to remember one individually, I couldn't say. [79]

Q. Mr. Holderby, you were very friendly with the officers and employees of the local?

A. Yes.

Q. As a matter of fact, the officers of the local tried to get you a job in Washington, D.C., didn't they, about that time?

A. That is a valued judgment.

Q. Sir, will you answer my question, isn't it a fact that an officer of the local at your request tried to get you a job in Washington, D.C., about that time?

A. It is hearsay because they didn't. They just merely talked about it, there was not concrete evidence.

Q. Who did you talk to?

A. Specifically?

Q. Yes. A. Bronson.

Q. Who——

A. I talked to Carroll. That was prior to August of '53 because Bronson asked me to leave the hall

(Testimony of Robert A. Holderby.)

as did Brother Bruett. They virtually kicked me out of the hall and told me to get out and not come back.

Q. You are still not answering my question. I have asked a simple question. Don't you remember when you left Courtesy Chevrolet that you came down to the hall and talked to them about getting you a job back in Washington, D.C.?

A. No, that was not true. [80]

Q. There was no mention made?

A. There was not between that period of time.

Q. You are louder than I am now.

A. Because in that particular time there was no fraternization between the then incumbent officers and Robert Holderby.

Q. When was it that you last fraternized with them?

A. Last May, fraternization, specifically, was dated May, approximately May 14, the date I had a long conversation with Bill Carroll and Ralph Bronson, the date that——

Q. Well, that fixes the time—when was your best judgment when you asked them to try to place you in Washington, D.C.?

A. All of that had transpired at the beginning of, or immediately after the elections of 1952, starting in November of '52 and the period of the correspondence when I was in the hospital. I had corresponded with Bill Carroll and he——

Q. When were you in the hospital?

A. I was in the hospital in the latter part of

(Testimony of Robert A. Holderby.)

'52 and—'53 and, wait a minute, now, '52 and '53, that's right.

Q. What period were you in the hospital?

A. December and January. And I have a letter to the effect that Bill Carroll was interested in my health and so forth and the fact that he had said that he had talked to the assistant secretary of labor out here that had been with the State Federation.

Mr. Grodsky: Haggerty? [81]

The Witness: No, no, assistant secretary of labor.

Q. (By Mr. Sokol): In the Federal Building?

A. Yes, Mashburn. And Bill Carroll also was supposed to have presented a resolution that the State Federation of Labor was going to endorse me for a position in the Labor Department. Also, that when I talked to Bronson, Bronson said that he would write that letter to Maloney in Washington, or something to that effect, and probably try through that means of getting me situated in that employment.

Q. You were interested in a white collar job, so to speak?

A. Yes, specifically, on that.

Q. Now, Mr. Holderby, it is a fair statement, isn't it, to say that after October, latter part of October of '53, that you turned down work from Local 12?

A. Of '53?

Q. Yes, after October of '53?

A. Most emphatically not, most emphatically not.

(Testimony of Robert A. Holderby.)

Q. I thought you testified on direct examination that you were not available?

A. That was in August of '53.

Q. In August of '53.

A. That was the last request or referral that was offered me. That is stipulated, I believe, by this—

Q. Isn't it—take it easy, relax. Isn't it the truth that one of the, that you got a call from a woman, a woman's [82] voice, said they was from Local 12 and this was in October of '53, and told you that there was work available and you said you had another job? A. No.

Q. You don't have to shake your head or throw any act, just answer yes or no.

A. I said no.

Q. Isn't it a fact that you told the people down at the union hall that you had another job when you had these automobile jobs, isn't that the truth?

A. The only time—

Q. Just answer yes or no.

Trial Examiner: You got to answer out loud, Mr. Holderby.

The Witness: I would say no.

Q. (By Mr. Sokol): After the Courtesy Chevrolet job, you went to work for Midway Motors?

A. Yes.

Q. When did you go to work for Midway Motors?

A. Fore part of November or latter part of October.

Q. Right after the Courtesy Chevrolet job you

(Testimony of Robert A. Holderby.)

went out and looked for work with another automobile agency? A. Yes.

Q. You went to work for Midway Motors?

A. Yes.

Q. A Ford outfit? [83] A. Yes.

Q. All right, you went from Chevrolet to Ford, you went up the scale? A. Yes.

Q. You went to Midway Motors in November of '53?

A. Latter part of October or fore part of November.

Q. And you went to work as a salesman, is that right? A. Yes.

Q. How long did you work for them?

A. Not very long, they fired me, too.

Q. They fired you, too. When did they fire you?

A. I don't remember the specific date there. It was before December.

Q. Of '53? A. Yes.

Q. And then you went out and looked for work where? A. Union.

Q. Did you go elsewhere looking for work?

A. I had gone out, yes, because——

Q. Where did you go?

A. I can list a series of employment agencies.

Q. Would you do that?

Mr. Sokol: That has nothing to do with back pay, only goes to the issue.

Trial Examiner: I think I can see what you are driving at. [84]

(Testimony of Robert A. Holderby.)

Q. (By Mr. Sokol): Where did you go for your job?

A. I wish I had a list of the various employment agencies.

Q. I don't want to shake your memory too much or otherwise cause you too much trouble.

A. I was filing at that particular time unemployment insurance.

Q. Wait, now, and answer. Look, after the Midway Motors job, you went out looking for work?

A. I filed for unemployment insurance.

Q. All right, we all do that. You went looking for work, you had to do that? A. Yes.

Q. You went down to automobile agencies?

A. Only one other.

Q. Which was that?

A. Another agency on Western, Ford.

Q. You don't recall the name of that?

A. No.

Q. What was the nature of the other businesses where you went seeking work?

A. I tried to get any available work.

Q. What was the nature in general of the business?

A. I tried selling jobs, I had tried to get a job in a shop.

Q. It was white collar?

A. No, no, this other shop work was not white collar.

Q. What was that job? [85]

A. Working in a foundry.

(Testimony of Robert A. Holderby.)

Q. You knew you didn't know anything about that?

A. Well, it was common labor, paid \$1.55 an hour.

Q. Did you go out to any firm that handled heavy duty equipment like cranes and shovels and so on and seek work directly through those concerns? A. No.

Q. You didn't do that at all? A. No.

Q. And so it is a fair statement that you made no effort to get work in the field of operating engineers?

A. On the contrary, I made an application with one employment agency that hires timekeepers and so forth in the construction field.

Q. I see. That answers the question.

A. I wanted that——

Q. You wanted a timekeeper's job?

A. Well, anything pertaining to the construction field which I was fairly familiar with and I had been on file with that particular agency for a period of several months.

Q. Never once did you go to an employer directly that had contracts with—strike that.

You knew that most of the industry had contracts with the Operating Engineers on heavy duty equipment?

A. I will say this, that a couple of my friends said that [86] they knew contractors that they would ask them for employment for me.

Q. Did you go down there and ask for it?

(Testimony of Robert A. Holderby.)

A. They were going to make an entree for me.

Q. Did you personally, Mr. Holderby, make any effort to get work directly in the industry?

A. Yes.

Q. Who did you see?

A. I went down to Griffith Company—well, yes, Griffith Company.

Q. Who did you see at Griffith?

A. Tom Oglesby.

Q. What did Oglesby tell you?

A. He said not much work right now.

Q. What job were you looking for?

A. Roller cat.

Q. No work available? A. No.

Q. That is the extent of it?

A. I also went to Haddock.

Q. Same answer?

A. Yes, virtually. I went to Webb & White.

Q. Same answer? A. Yes.

Q. Did you know, Mr. Holderby, that some of the employers [87] that you had worked for in the past who you had been referred to through the union had written into the union criticizing you as a workman? A. I certainly——

Q. Answer that.

A. Yes, yes, may I elaborate on that more for a moment?

Q. I'm not asking you to elaborate.

A. I would like to.

Q. It is getting late in the day.

(Testimony of Robert A. Holderby.)

A. Something specifically that has bearing on that.

Trial Examiner: I think your counsel may ask you that.

Q. (By Mr. Sokol): Mr. Holderby, during all of that time you were also doing outside work for the Democracy for Labor Unions?

A. That is an association for democracy and unions, incorporated.

Q. When was that organized?

A. That was organized in July of '53.

Q. And so from July of '53 you took an active part in that particular association?

A. I have.

Q. And that association, was that formed to dislodge the officers or change the administration of the Operating Engineers Union? A. No. [88]

Q. What was the purpose of that setup?

A. I believe the title is self-explanatory.

Q. I don't know, you know how those things are.

A. Its an organization contrived by a group of men who are interested in democracy in union, a democratic function where the usurpation of power by a hungry few could be controlled in some degree by stimulating a desire for membership.

Q. Then you went out and solicited members in that organization?

A. At any opportunity I had, yes, I did.

Q. Did you devote your daytime hours to that?

A. No.

Q. Only at night?

(Testimony of Robert A. Holderby.)

A. Any particular place, I was not being paid for soliciting. I would talk to people who were members of the unions and, in our conversation, they would perhaps say something and I would say, "Perhaps you would like to become affiliated with an organization that is interested in democracy in unions." And we would talk, like I'd sit in a restaurant and I solicited.

Q. Im not really interested. I thought it was a job. A. No, no.

Q. As a matter of fact, I think the title appropriate, but to go on with this—let's see, did you ever handle a grove oiler? [89] A. A who?

Q. A grove oiler?

A. No, never heard of one. Grove oiler.

Q. Were you a roller operator? A. Yes.

Q. What is a B. G. Spreader?

A. Barber Green.

Q. Were you ever on one of those?

A. Yes.

Q. Did you ever handle any tractors?

A. Yes.

Q. What kind of tractors?

A. D-6, D-2, D-4, D-8, HD-7, HD-14.

Q. Where did you function as a roller operator, what job was that?

A. I worked for Southwest Paving, I worked for Griffith Company, I worked for Osborne Company, I have worked for G. J. Payne, worked for Vernon Paving, I have worked—there's several others that I worked for.

(Testimony of Robert A. Holderby.)

Q. What was that, for a day or two?

A. No.

Q. What was the longest you ever worked?

A. I guess Griffith Company was the longest I ever worked for.

Q. How long was that?

A. Approximately two and a half months, intermittently, [90] right after the, right after the strike of 1952.

Q. Not just on the roller?

A. Yes, and cat and Barber Green. They changed me off. The last job I had was terminated because of lack of work. The people were willing to write a letter of recommendation because——

Q. The last job you worked—let's clear the record a bit.

A. The last employer I worked for was willing to give a letter of recommendation for my quality of work.

Q. I don't want to have to thumb through these records tonight, Mr. Holderby, and I know you don't want me to work overtime. I try to be fair with you. You know we got this exhibit up, this Exhibit 8, and I told them to be very accurate and it says, G. J. Payne, 6-9-53 and 6-9-53, R. I. Reported In. A. That is an error.

Q. Why do you make that statement without having records of your own?

A. Well, if you wish we may go to the County because they made my payroll for me. They paid me and I was operating a G. J. Payne piece of

(Testimony of Robert A. Holderby.)

equipment that was leased to the County for a period of approximately 15 days over on the east part of Los Angeles.

Q. But you worked for Payne before?

A. Yes, a one day job.

Q. Well, I will have to check that. [91]

Trial Examiner: Let me ask a question, where that exhibit says "R. I." it means reported in. Does that mean he reported to the employer or does that mean that he reported back as being unemployed?

Mr. Sokol: That's right, reported in on the out-of-work list.

Trial Examiner: All right.

Mr. Sokol: So that is the only one that he says is in error, this Payne job.

The Witness: The others could be in error but that is, specifically, I know because I remember the last job I had as operating engineer.

Mr. Sokol: Frankly, I have to check the record if I'm going to do any further questioning. If he is going to be here tomorrow, I don't want to hold you, if you are going to leave, I am just going to take chances. May I have the opportunity if he appears tomorrow to ask a few questions? I'm not insisting.

Trial Examiner: Mr. Holderby says he will be here.

Mr. Sokol: I have nothing further.

Mr. Grodsky: May I have a short recess?

Trial Examiner: All right, we will take a five-minute recess.

(Testimony of Robert A. Holderby.)

(Short recess taken.)

Trial Examiner: I will call the hearing to order, please. [92]

Q. (By Mr. Sokol): Mr. Holderby, during all of this time that you have related, did any officer or agent, male or female or otherwise, ever tell you that you were not going to be assigned out to work because of your union activity on, otherwise?

Mr. Grodsky: I will object to that as immaterial.

Trial Examiner: Overruled. You may answer.

The Witness: That is a lurid question, a lot of history behind an answer of yes or no.

Q. (By Mr. Sokol): Answer my question, did any representative of the union at any time tell you that they were going to see that you were not given job referrals, you can answer that yes or no.

A. I can't recollect.

Mr. Sokol: That is all.

The Witness: One way or the other.

Trial Examiner: You got any redirect examination?

Mr. Sokol: I have one more on that list. Where is that list that I gave you back, Exhibit 8?

Mr. Grodsky: I had left it with the girl.

Q. (By Mr. Sokol): After June of '54, you say when you came back to the union, they sent you out on jobs again?

A. When I came back at what period of time?

Q. After June of '54?

(Testimony of Robert A. Holderby.)

A. I had been back there for a long time looking for employment. [93]

Q. My question——

A. I sat in the hall for months.

Q. Wait, now, you are trying to volunteer an answer. My question is, after June of '54, did you get any referrals out of the union and go out on jobs? A. Yes, sir.

Mr. Sokol: That is all.

Trial Examiner: All right.

Redirect Examination

Q. (By Mr. Grodsky): Mr. Holderby, you were asked about your employment with Ellis. Now, when was the last time that you worked for Ellis?

A. Terminated employment August, 1951.

Q. Now, Mr. Sokol asked you whether in 1953 and 1954 you made any application for employment with Ellis and you answered that you did not, is that correct? A. That is correct.

Q. Mr. Sokol further asked you whether you could have worked for Ellis during that period. Do you recall being asked that question?

A. Well, yes.

Q. What was your relationship with Mr. Ellis at that period?

A. For employment, it was rather adverse. I could not have been reemployed by Ellis.

Q. When you say you could not have been re-employed, what [94] do you mean by that?

(Testimony of Robert A. Holderby.)

A. My tenure of employment was severed on my own volition but under adverse conditions.

Q. In other words, you left with it not in a friendly atmosphere? A. Yes.

Q. And under those circumstances you felt that you could not make a successful application for employment? A. Yes.

Q. Now, you further testified that you are aware that some employers have written to the union adversely concerning your work. Do you recall that testimony? A. Yes.

Q. When did you first become aware of such criticism of your work by former employers?

A. Specifically in December at the trial in the Superior Court of '53. [95]

* * * * *

The Witness: As I stated, I visited Tom Oglesby and asked about employment and in that conversation, I asked him, I said, "Has anyone been around here talking to you about me?"

And he said, "Yes, Bill Carroll was out here," and he said, "Bill wanted to know what kind of an operator you were."

And I said, "Well, what did you say?"

And he replied, he said, "Well, I told him that you were satisfactory and that you quit on your own volition, that [97] because of your physical inability at the time, that you quit."

That was the particular conversation at that particular time.

(Testimony of Robert A. Holderby.)

Q. (By Mr. Grodsky): When did that conversation take place?

A. That was sometime around July, July or August of '53.

Q. During the time that you have worked as an employee referred by Local 12, have you had, have your employers complimented you with reference to the quality of your work?

A. Yes. In fact,——

* * * * *

Q. (By Mr. Grodsky): During the period of your employment, have any employers criticized your work? A. Yes.

Q. And have any of them discharged you or let you go because you were incapable of doing the work that you were assigned to do? [98]

A. Yes.

Q. Did that happen on one or more than one occasion? A. More than one occasion.

Q. Can you recall the number of occasions?

A. Quite a few, yes.

Q. That you were discharged?

A. For one reason or another and if I might cite this, if it's admissible, it's a peculiar problem to go out and satisfy a contractor or his foreman or perhaps a superintendent. I believe we have three witnesses who are journeymen of the trade who can vouch for my statement now that you can go out on a job, say, you skin cat, you last a half day or perhaps one hour and be booted off the equipment, sent down the road.

(Testimony of Robert A. Holderby.)

You'd be cleared out to work for another contractor and work for a period perhaps two days to six months or a year. It's different to satisfy all employers in the same way. It might be the shade of your hair, the cut of your hair.

Mr. Grodsky: I have no further questions.

Recross Examination

Q. (By Mr. Sokol): I think what is important, though, was that on particular types of equipment that you were unsatisfactory, what type of equipment? A. No, because I have——

Q. Now, wait, let's get specific. Give us an example of an employer that fired you for sloppy work. [99]

A. Vernon Paving Company.

Q. What kind of equipment?

A. I was on a roller.

Q. Why were you canned off that job?

A. Because I jumped up to the curb with a roller.

Q. Incompetent work?

A. No, inefficient equipment, poor repair.

Q. Give me another employer that you were canned from.

A. I was canned, I was canned on a push cat.

Q. How did that happen?

A. Because I was carrying my blade too high and cutting the rubber. That was an error on my part.

Q. Give me another example.

(Testimony of Robert A. Holderby.)

A. I was canned off of a D-4, later at the regret of the operator, I mean, of the foreman.

Q. Where were you canned off of a D-4?

A. When I got on the D-4, I had not been on one for a long time. I was not doing the work that I should have the first day and I kept doubling and worked for three days for the company and at the end of the first day they made a request for another man that couldn't fill it for three days. Then when they filled the job he said, "I'm sorry I called the other fellow in. You are doing much better than when you first started."

Q. Give me another example where you didn't handle the [100] equipment right. C

Mr. Grodsky: That assumes facts not in evidence.

Q. (By Mr. Sokol): If one occurred.

A. On a screed job there was, because of my feet, I couldn't stand on my feet too much and I was gripping off on the control of the particular piece of material so I was fired there.

Q. I think we have had enough examples. Thank you very much.

Redirect Examination

Q. (By Mr. Grodsky): Now, when was it that you were discharged by Vernon Paving?

A. I was discharged twice; once for screed and once for the roller. Screed was the feet situation and the other one was because of disrepair of the system.

(Testimony of Robert A. Holderby.)

Q. I'm not asking why, I'm asking when.

A. That was in '53.

Q. After the time you were discharged from Vernon Paving on the roller job, did you have occasion to operate a roller for other employers?

A. Yes.

Q. On one or more than one occasion?

A. More occasions.

Q. Did you operate it satisfactorily?

A. Obviously because I was not fired.

Q. Did you have occasion to operate screeds satisfactorily for other employers after the occasion where you were fired from [101] that job?

A. Yes.

Q. And does the same answer hold true about the push cat?

A. I have only been on one push cat job.

Q. That was the only one and you were fired on it because of the rubber? A. Yes.

Q. And what about the D-4, did you work on other D-4 jobs? A. Yes.

Q. Subsequent to that time?

A. Prior to and subsequent to.

Q. Subsequent is what I'm interested in.

A. Yes.

Q. Did you work satisfactorily subsequent to that? A. Yes.

Recross Examination

Q. (By Mr. Sokol): Mr. Holderby, I know the Trial Examiner wants to know something about

(Testimony of Robert A. Holderby.)

that case, particularly, when a man is a good operator, he will go to work for Griffith, or one of the contractors, and be on the payroll fairly permanent? A. No.

Q. Well, he wouldn't go out to the one and two day jobs like you had and then get off the job, isn't that a fair statement?

A. I can cite during one particular period there where every [102] job that I was referred to was a one or two day job.

Q. Exactly.

A. Oh, no, they were of short duration, now.

Q. You never had a permanent job, what you would call a permanent job with any construction company?

A. I imagine, that is difficult to try to pin me down because——

Q. Answer the question. Did you have, ever have a fairly steady job with any contractor at any time? A. Yes.

Q. What contractor? A. Ellis.

Q. We know why. But any other contractor?

A. Well, the companies that I worked for, I was cleared out of the hall, two of them, I began the job, I terminated the job. I worked to completion.

Q. Here is what I'm getting at, Macco, for instance, you know they have lots of heavy equipment? A. Yes.

Q. And they have a crew down there?

A. Yes.

(Testimony of Robert A. Holderby.)

Q. And they have permanent members on the crew of heavy equipment? A. Yes.

Q. You never got a job in your life like that, isn't that true? [103] A. Yes.

Q. Isn't that true? A. Yes.

Q. That kind of work, those men that are on a steady crew are the experienced help, isn't that true, the men that do a good, solid, competent job, isn't that true? A. Yes.

Q. The longest that you ever were on a job was that Payne job that you were talking about?

A. No.

Q. What was that other?

A. Griffith Company.

Q. How long were you on that job?

A. I told you approximately two and a half months and I terminated on my own volition.

Q. That was when?

A. That was in September, latter part of September of '52.

Q. What was the very last job that you held since before this hearing?

A. The last job, I was with Osborne Company.

Q. What kind of work did you do there?

A. Rolling, grade rolling asphalt.

Q. How long did you last there?

A. The job termination, until they were out of work.

Q. How many days? [104]

A. Approximately five weeks.

Q. Five weeks?

(Testimony of Robert A. Holderby.)

A. Yes. Those were the people that were willing to give me a letter of recommendation to any other employer.

Q. Have they called you back to work, have you applied to them for work?

A. Have I applied to them again?

Q. Yes.

A. No, because the work was terminated.

Mr. Sokol: That is all.

The Witness: And the policy is that you don't solicit your own job specifically. That has been the policy and has been frowned upon very, very heavily by the union. [105]

* * * * *

Mr. Sokol: I'm ready to proceed on this case and close this case up tonight. I have very urgent business to attend to and if you have any other evidence you can stipulate, to word it factually, I will try to stipulate to it.

Mr. Grodsky: I can't word it factually. First of all, commerce——

Mr. Sokol: I will stipulate to that. I will stipulate the same testimony in that other case will apply to this case. [106]

* * * * *

HAROLD M. McNEEL

a witness recalled by the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Grodsky): You had better give your name again. A. H. M. McNeel.

Q. You are the same Mr. McNeel who testified yesterday? A. Yes.

Q. And this morning you and I were out at the office of Local No. 12, is that correct?

A. Correct.

Q. And in connection with that I went through certain records and I questioned your chief dispatcher? A. Correct.

Q. In your presence? A. Yes. [118]

Q. Now, the information obtained discloses that the old out-of-work lists are destroyed and they are not available. A. That is correct.

Q. The only out-of-work list available is the current list? A. Correct.

Q. And only one copy of the current list is available? A. That I don't know.

Q. If I told you that your chief dispatcher told me that she only has the one copy, would you agree that that was a fact?

Mr. Sokol: I think that is ridiculous.

Trial Examiner: I think that is ridiculous too.

Mr. Grodsky: All right. Well, I will withdraw the ridiculous question.

Q. (By Mr. Grodsky): Now, the current method

(Testimony of Harold M. McNeel.)

of obtaining out-of-work lists has been in effect since about the first of the year?

A. That is correct.

Q. And prior to that time, a number of lists were made out?

A. I don't know whether you mean a number of the same lists each week.

Q. A number of copies of each individual weekly list were made out? A. Correct.

Q. And one copy, at that time, was available for the [119] inspection of members in the hall?

A. That is correct.

Q. And other copies were distributed within your organization, is that correct?

A. Correct.

Q. That system has been superceded by the system which is presently followed?

A. That is correct.

Q. Also, prior to September 1 of this year a different system was used with reference to the maintenance of the records of persons out of work who are seeking employment, is that correct?

A. No, I don't—well, maybe I do understand the question. There has not been any change in the system.

Q. I said the system of the maintenance of the records.

A. Oh, yes, that has been changed.

Q. Now, prior to the 1st of September the names, or I should say, the cards of persons out of work and seeking employment through Local 12

(Testimony of Harold M. McNeel.)

were kept on the wheel, if those persons were members of Local 12 or if they were persons who were transferring in or if they were applicants who had made a payment on their initiation fee? Is that correct?

Mr. Sokol: Let us hear that question again.

Trial Examiner: Would you please read the question, Miss Reporter? [120]

(Question read.)

The Witness: All on one wheel, yes.

Q. (By Mr. Grodsky): But not on that wheel were the names of persons who had filled out information cards and who had not made any payment towards their initiation fees?

Mr. Sokol: I think he should be asked a specific question here. That is the trouble about questions like that. He answers the question and it doesn't make a good record. I think he should be asked specifically, did the men have to pay a fee to get on the wheel. Let us know the facts.

Mr. Grodsky: I will ask it that way.

Q. (By Mr. Grodsky): Did the men have to pay a fee in order to get on that wheel?

A. He did not absolutely have to pay any fee. It depended on his position, whether he was transferred in. If he was transferred in, he had naturally to pay a transfer fee, but it wasn't absolutely necessary.

You could get on that wheel without paying a dime until you went to work.

(Testimony of Harold M. McNeel.)

Mr. Sokol: That was a big surprise, any inclusions of that in there.

Mr. Grodsky: You are due for surprises or one of us is.

Q. (By Mr. Grodsky): I show you General Counsel's Exhibit No. 9 for identification and ask you if that is the information card of the type which persons who would first come in [121] and wish to apply to be put to work, would they fill out this type of a card?

A. It would depend on who the person was.

Q. It may be simpler if I will ask you what the card is and ask you what are the circumstances under which persons fill it out.

A. A man coming in seeking work is handed one of these cards. It isn't affiliated with the union.

Trial Examiner: Let me get it straight now. Say a man, who wanted to be an oiler or to do work in a classification that the engineers have, just came to town. He had no connection with the union whatsoever and he said, "I want a job".

Would such a man be handed this card?

The Witness: He would.

Trial Examiner: And asked to fill it up?

The Witness: He would.

Trial Examiner: Is he the only one who would be asked to fill out this card?

The Witness: Not necessarily.

Trial Examiner: Who else would be asked to fill out this card?

The Witness: Any one seeking work.

(Testimony of Harold M. McNeel.)

Trial Examiner: Whether he was a member or not?

The Witness: Oh, no, a member would not.

Trial Examiner: I am sorry, Mr. Grodsky.

Mr. Grodsky: It is all right.

Q. (By Mr. Grodsky): A person transferring in would be asked to fill that in?

A. Not necessarily. Sometimes they do, but not necessarily.

Q. Do you know Mr. Holderby was asked to fill one out after he had been suspended?

A. No.

Q. You don't know?

A. No, I don't know.

Q. Now, coming back to the question, before the 1st of September——

Trial Examiner: Is that September of this year?

Mr. Grodsky: Of 1954, that is correct.

Trial Examiner: Thank you.

Q. (By Mr. Grodsky): When a person came in and filled out an information card, and we are now talking about a person who has not been affiliated with this or any other union at any time, a new man, what was the method by which the information that he was available for employment was retained for the dispatcher?

A. Prior to September, it was maintained in a file.

Q. It wasn't maintained on the wheel where you listed some other persons who were seeking employment?

A. No. [123]

(Testimony of Harold M. McNeel.)

Q. And what was the practice with reference to seeking out these people for employment?

In other words, what did the dispatcher do?

A. You mean as far as these cards are concerned?

Q. Yes.

A. When there was a call for a job and there was no one who was capable of filling it, they came to the application card.

Q. And then they would notify that person about an opening? A. Yes.

Q. And that person would have to come in and pick up a referral? A. Yes.

Q. And at that time, that person would have to make application for admission to the union?

Mr. Sokol: That is leading and suggestive.

Trial Examiner: Oh, yes, but let us see what is the answer to that.

The Witness: Well, he would be cleared to the job and he would have, as the contract calls for, thirty days to become a member according to the contract.

Q. (By Mr. Grodsky): My question is what was the practice and I am not referring to the contract. I am referring to what was the practice.

Was the practice that he would have to make his application for membership at that time and would have to make a [124] payment on his initiation at that time? A. I don't know.

Q. Isn't that what the chief dispatcher told us this morning?

(Testimony of Harold M. McNeel.)

A. It may have been when you were talking to her, but at that time there was another man talking to me.

Q. Not at that time. I was very specific about that, but if you do not remember that, we will have to get Cynthia down here to check up on that.

Mr. Sokol: She is just an office employee and bringing her down here wouldn't serve your purpose.

The Witness: I do know this, that it isn't absolutely necessary to do that. I know that men have been cleared without putting a dime down on it. I do know that.

Q. (By Mr. Grodsky): Well, would your office records in any way reflect that?

A. Certainly.

Q. Who would have charge of these office records?

A. You saw the membership wheel and the date of payment and what they paid for.

Q. Those are different wheels from the ones that we have been talking about?

A. Oh, yes, that is membership.

Q. Could you, by referring to those wheels, get specific examples of persons who have been cleared out without payment of dues, without payment of a fee? [125]

Mr. Sokol: Well, I am not going to ask my client to wade through years of that.

I want to say this for the record, that some misguided individual, contrary to the legal advice given

(Testimony of Harold M. McNeel.)

this labor organization, when someone came up for a job, to sign the application, when the policy of the union was to abide by the agreement that they were entitled to work for thirty days, supposing some misguided individual was opposed to it and the contractual relationship, the Board would not follow that rule that the error of someone in the union would bind the company.

Trial Examiner: I think he is entitled to answer the question.

The Witness: Could I have the question again, please?

Trial Examiner: Would you read the question, Miss Reporter?

(Question read.)

The Witness: Again I say I don't know how it could be answered. You would go through thousands of names to arrive at that.

Q. (By Mr. Grodsky): Well, Mr. McNeel, if that were a practice——

A. I didn't say it was a practice. I said it has been done.

Q. Well, then, let me ask you what is the practice? [126]

Is it the practice of the union to require the payment of the fees?

Trial Examiner: Why don't you stop with your first question, what is the practice?

Mr. Grodsky: All right.

The Witness: The practice is that they sign an

(Testimony of Harold M. McNeel.)

application, but they do not have to pay any money when they sign an application.

Trial Examiner: When you say, "an application," in this regard, you mean an application for membership?

The Witness: Yes. You should know.

Mr. Sokol: I suppose you directed that last remark to Mr. Holderby?

The Witness: Yes.

Trial Examiner: Let us proceed.

Q. (By Mr. Grodsky): I will show you General Counsel's Exhibit No. 10 and ask you if this was copied from Mr. Holderby's work record in the office this morning?

For your convenience, I have the record here.

Mr. Sokol: Well, if it was copied that will be all right.

Q. (By Mr. Grodsky): It was done by one of the girls in the office?

A. That is his record.

Mr. Sokol: Is that his record? [127]

The Witness: Yes.

Mr. Grodsky: I will now offer General Counsel's Exhibit No. 10 in evidence.

Mr. Sokol: No objection.

Trial Examiner: Incidentally, did you ever offer General Counsel's Exhibit No. 9?

Mr. Grodsky: I am sorry. If I did not, I am offering it at this time.

Trial Examiner: Any objection.

Mr. Sokol: No objection.

(Testimony of Harold M. McNeel.)

Trial Examiner: General Counsel's Exhibits Nos. 9 and 10 will be admitted.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 9 and 10 respectively and were received in evidence.)

[See page 161 for Exhibit No. 10.]

Q. (By Mr. Grodsky): Now, I will show you this document which I am not going to have marked and ask you if you know what that is?

A. Yes, this is his work card.

Trial Examiner: Whose work card?

The Witness: Mr. Robert Holderby.

Q. (By Mr. Grodsky): And on this work there is a notation here.

Trial Examiner: Incidentally, Mr. McNeel, those are the original records of the union?

The Witness: They are. That is the card that is kept in [128] the dispatching office and a complete record is kept of each member.

Q. (By Mr. Grodsky): Now, I will ask you if you can read this notation into the record.

Mr. Sokol: Which one is that?

Mr. Grodsky: 6-9-53.

Q. (By Mr. Grodsky): Will you read that out loud, please?

Mr. Sokol: I will read it. "6-9-53. Per Carroll. Money refunded no longer a member to be cleared."

Mr. Grodsky: "No longer a member."

Mr. Sokol: Then next, "to be cleared". Well, ask him what it means. I know exactly.

(Testimony of Harold M. McNeel.)

Mr. Grodsky: Just a minute now. There is no period after the word "member".

Just look at it, Mr. Trial Examiner.

Trial Examiner: If you want me to take some information from that card and if it is a question as to whether there is a period in there or not, I want a photostatic copy of that in the record.

Mr. Grodsky: This is done in pencil and the photostatic copy doesn't show up clearly where it is in pencil.

I will ask the witness a question.

Q. (By Mr. Grodsky): Is there any period after the word "member"?

A. There is no period but that isn't what it means. [129]

Q. The next word after the word "member" is the word "to", is that correct? A. Yes.

Mr. Sokol: I want the Trial Examiner to state for the record how that is written and whether or not the words "to be cleared" are on a separate line.

Trial Examiner: All right, I will do it. As I read this, Mr. McNeel, you follow me.

The matter which I am going to read appears to be in pencil and it starts out on one line, "6-9-53 per Carroll."

The next line reads, "Money refunded".

The next line reads, "No longer a member".

The next line reads, "to be cleared."

Then the next notation seems to be a notation regarding 6-25-53, which reads, "to be kept on," on the first line.

(Testimony of Harold M. McNeel.)

And on the second line are the words, "list per Mr. Bronson", as I read it. And then there is another notation down here, beginning, "7-8-53", which seems to be a referral to a job or something. At least, it has nothing to do with this present controversy.

I trust that everybody is satisfied.

Mr. Sokol: Thank you very much.

Mr. Grodsky: I have just one more question which I have been trying to ask patiently.

Q. (By Mr. Grodsky): In the phrase "to be cleared", does [130] the word "to" start with a capital "T" or a small "t"?

A. It should start with a capital "T".

Q. I ask you to look at this and tell me whether it starts with a capital "T" or a small "t".

A. I don't know.

Trial Examiner: Let us not hedge around here.

That is a small "t" is it not, Mr. McNeel? At least, that is the way I see it.

Mr. Sokol: You know the poet, E. E. Cummings is starting his sentences with small letters and I believe if the poet were writing that, he would be starting the beginning of a sentence with a small "t".

The Witness: That was the intention. He was to be cleared.

Trial Examiner: Well, let us get back as to whether that was a small "t" or a capital "T".

The Witness: I would say it could be.

Trial Examiner: It could be what?

(Testimony of Harold M. McNeel.)

The Witness: Well, some people make capitals that way, but that was the intention.

Trial Examiner: Mr. Grodsky, I think in view of the witness' answer, you had better have that card photostated.

Mr. Sokol: Now, wait a minute. Personally to me, it looks like a small "t".

Trial Examiner: Thank you, Mr. Sokol. [131]

Mr. Sokol: But all this is much ado about nothing.

Trial Examiner: I agree about that.

Q. (By Mr. Grodsky): Now, at my direction, did your chief dispatcher withdraw the cards of those members, those employees, who have been referred according to your out-of-work list from your current out-of-work list for the job of oiler this week? A. Yes.

Q. And I am holding now in my hand all those cards which are five in number, is that correct?

A. Correct.

Q. I have here the card of Joe Liveringhouse, and I will ask you if this is correct, that on 8-20-54 he was referred out to a job for Kiewitt?

A. Yes.

Q. Is that Peter Kiewitt? A. Yes.

Q. That after he reported in on 10-11-54—and do you know what this notation means?

A. Called out.

Q. He was called out on 10-12-54——

Mr. Sokol: For what?

(Testimony of Harold M. McNeel.)

Mr. Grodsky: Well, at 2:15 p.m. he was called out but he wasn't present.

Mr. Sokol: Oh. [132]

Q. (By Mr. Grodsky): At 10-14-54 he was called twice and the notation there is "NA".

A. That means not at home.

Q. At 10-15-54 he was called twice?

A. Yes.

Q. And at 10-16, he reported for a job at J. Dolfman? A. Yes.

Q. I have here the card of John Polsky and his record for the same period substantially shows that on August 24, 1954, he was referred to Bechtel Corporation.

On 9-16-54 he reported in that he was no longer working. At 10 a.m.—well, is that correct?

A. That is what it says, yes.

Q. The next notation is "10-8-54, L.W." which means "left work"? A. Yes.

Q. At 10-8-54 he was referred to Sweger Kirshman, oiler, 10-13-54, and there is a notation here "R.I. three days", which means he had worked three days? A. Yes.

Q. And under your rules since he had worked three days he goes back to his same place on the list? A. That is right.

Q. And from 10-16-54 he was sent out to Dewey Reser, is that right? [133] A. Yes.

Q. In order to make the record perfectly clear, the chief dispatcher told me that he was specifically

(Testimony of Harold M. McNeel.)

requested by Dewer Reser, for whom he has worked before according to his record.

Under your practice, if he was specifically requested by the employer, he would be sent out under these circumstances, would he? A. He would.

Q. I have here the card of E. A. Tucker and it shows that on July 21st he was referred out as an oiler, that he afterwards reported in on September 27th, is that right? A. Yes.

Q. And that he was referred out on September 30, 1954, to Izzie Construction as an oiler?

A. Yes.

Q. And then it says, "two days back on list."

A. That is right.

Q. He then was referred out on 10-11-54 to Floyd Welt but then it says, "did not take job, back on list", and then on 10-15 he was referred out to Robert E. McKee, oiler, on "B.C."

What does "B.C." mean, do you know?

A. I don't know.

Q. Any way, oiler on B.C.? [134]

A. Yes.

Q. The next card I have here is Warren W. Breece, who is an oiler and his card shows that he was on the list as of 9-3-54.

Trial Examiner: On what list?

Mr. Grodsky: On the out-of-work list.

Trial Examiner: Oh, all right.

Q. (By Mr. Grodsky): I am correct on that?

A. Yes.

Q. And on 9-8-54 it says, "3 p.m. NH", which

(Testimony of Harold M. McNeel.)

means "not at home", and then it says, "Moved, send card", and there is a check mark after that?

A. Yes, they send a card to them if they cannot get them on the phone.

Q. They send them a card to keep in touch with them? A. Yes.

Q. Then there is 9-24, and another notation of the same sort. 9-27 he was referred out to McDonald & Kruse and 10-1 he reported in.

10-4, "contractor reports inebriated", and 10-11 he reported in.

10-14 he was referred out to Mat Zeich as an oiler, is that correct? A. That is right.

Q. The next card is Lee Armstrong and he was sent out on [135] September 8 to Ansco Concrete Setting. He reported back in on September 25 and there are a number of notifications of efforts to get in touch with him on different dates, one, two, three, four, five, six.

And then on 10-11 there is a notation "Sent card"? A. Yes.

Q. And then on 10-13 he reported in at 8 a.m.; is that correct? A. Yes.

Q. And 10-16 he was sent out to Bechtel Corporation, is that correct? A. Yes.

Q. These are the original records which I have been reading to you? A. Yes.

Mr. Sokol: You do not want a photostatic copy now, do you?

Trial Examiner: No, we do not require that now.

Mr. Sokol: Can we have a five minute recess?

(Testimony of Harold M. McNeel.)

Trial Examiner: We will have a recess.

(Short recess.)

Trial Examiner: I will call the hearing to order, please.

Any further questions of Mr. McNeel?

Mr. Sokol: No questions. [136]

Mr. Grodsky: Just a second. I may have some here. I have one further question that I do not think has been asked.

Q. (By Mr. Grodsky): Getting back to before September 1 of 1954, on your out-of-work list, when a person would fill out an information card and he wasn't a member, he had not paid in any money or anything else, his card was in a file, is that correct? A. That is correct.

Q. Now, if a person who was a member reported out of work, he would be put on the out-of-work list, is that correct? A. That is correct.

Q. And he would have to be considered for dispatching before the man whose name was on the file, is that right?

A. Depending on the classification.

Q. I am talking about the same classification.

A. Yes, the same classification.

Mr. Grodsky: No further questions.

Trial Examiner: Anything from you, Mr. Sokol.

Cross Examination

Q. (By Mr. Sokol): The non-members, were they persons who had never worked as far as you know in the multiple employer unit?

(Testimony of Harold M. McNeel.)

A. I don't know that any of them had.

Q. You first dispatched the people under the contract, those that worked in the multiple employer unit within the [137] period?

A. That is correct.

Mr. Grodsky: I will object to that. That isn't what the testimony of the witness has been. There has been no evidence here. There has not been any evidence on the multiple employer unit.

Mr. Sokol: You have not been listening.

Trial Examiner: Oh, to the contrary. I will overrule the objection.

Mr. Sokol: I think there was an answer, Miss Reporter, will you please read it to me?

(Answer read.)

Trial Examiner: Anything further?

Mr. Sokol: Nothing further.

Q. (By Trial Examiner): Mr. McNeel, these cards you have produced here are application cards which are in the original records? These cards are three by five inches and are the original records of the union? A. Yes.

Q. They have a hole in them and apparently they go on some kind of a frame?

A. A wheel they call it.

Q. And on each one of these cards, the man's name appears, his social security number,—I suppose that is what is above his name? [138]

A. Yes.

Q. And then there are his various and sundry

(Testimony of Harold M. McNeel.)

occupational classifications, also typed, to the right of his name? A. Correct.

Q. Some of those I see are typed and then on occasions you find some where a classification is written in, in pencil? A. Yes.

Q. Such as on Mr. Holderby's card. There is the pencil notation, "screed * * *" and something or other. A. Yes, something or other.

Q. I cannot make it out, but any way, that is in pencil while the rest of his occupational competency is in typewriting? A. Yes.

Q. Now I notice that the cards which were read from by counsel for the General Counsel are those cards, but on Mr. Holderby's card we have a color scheme at the bottom of the card, made up of various and sundry tabs of different colors.

A. Yes.

Q. There are, incidentally, four different colored tabs, as I see it. A. Yes.

Q. Can you tell me what those color tabs are?

A. This green one indicates tractor doser or it could also mean, in some instances, heavy duty repairman. [139]

The dark green one means cat. And the light green one, I am not too sure, but I think that means A-frame.

Q. And the orange one?

A. That means roller screed operator.

We have six different colors and they put on the colors in order to help the dispatcher in going through the cards.

(Testimony of Harold M. McNeel.)

Q. With your oilers then, I gather that all the five men whose job classifications were read, or jobs were read, were all oilers?

A. Yes, but we do not tab oilers.

Q. Well, here is one who is a fireman.

A. Yes, fireman oiler.

Q. Now, getting back to Mr. Holderby's card, again, you have still got one tab to go. Would you tell me what that other tab is?

A. These tabs are just to make it easy to pick it off the wheel.

Mr. Sokol: A lifting tab.

The Witness: Yes.

Trial Examiner: Well, have I brought up anything that any one wants to inquire about?

Mr. Grodsky: Yes, I have something.

Redirect Examination

Q. (By Mr. Grodsky): Does Mr. Holderby's card indicate the word "tugger" on it in pencil as a classification? [140] A. No, not in pencil.

Q. "Tugger" is typed in? A. Yes.

Q. Secondly, those tabs only appear where a person has journeyman classifications, is that right?

A. Not necessarily, no. The only ones that we do not have tabs for are the apprentices and oilers.

Q. Is there any category between an apprentice and an oiler and a journeyman?

A. Oh, yes.

Q. Well, what for example?

A. You mean the difference between them?

(Testimony of Harold M. McNeel.)

Q. No. You said that you do not have tabs for apprentices or oilers? A. That is right.

Q. Then it stands to reason that the only cards which are tabbed are those of journeymen?

A. That is right.

Q. Well, this would indicate, according to the records of your organization, that Mr. Holderby has journeyman qualifications?

A. That is right.

Mr. Grodsky: No further questions.

Recross Examination

Q. (By Mr. Sokol): Did you check that Payne job that he was [141] on in June of 1953?

A. He said he was on the job fifteen days and the record shows something else.

Q. What does the record show?

Mr. Grodsky: I cannot find it on the record.

Mr. Sokol: Was it not on the record? It was in June of 1953, was it not?

Trial Examiner: Let us go off the record while we find it.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Sokol: On the second page of Board's Exhibit No. 8 where it says, "6-9-53, R.I. reported in". That doesn't conform with the original record, that on 6-9-53 it says, and it has been previously referred to, "Per Carroll. Money refunded no longer a member" and then, "to be cleared."

That covers it.

(Testimony of Harold M. McNeel.)

Trial Examiner: All right. Is that satisfactory to you, Mr. Grodsky?

Mr. Grodsky: That is satisfactory to me, yes.

No further questions.

Trial Examiner: Anything further, Mr. Sokol?

Mr. Sokol: No.

Trial Examiner: Thank you very much, Mr. McNeel.

(Witness excused.) [142]

Mr. Grodsky: Mr. Holderby, will you take the witness stand?

Trial Examiner: All right, Mr. Holderby, you have been already sworn.

ROBERT A. HOLDERBY

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Grodsky): Mr. Holderby, I show you General Counsel's Exhibit No. 10, which is a continuation of the union record from your work card to date.

I will show you specifically a notation, "4-9-54" and after that there appear the words, "wants to oil".

Now, I will ask you if you recall any conversation which you had which led to that notation?

A. I cannot remember any conversation pertaining to that notation.

(Testimony of Robert A. Holderby.)

If I may, I would like to state——

Mr. Sokol: He has answered the question. [143]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 2

STANDARD FORM AGREEMENT

This Agreement is entered into this.....day of, 19.., by and between the undersigned, herein referred to as the "Employer", and the International Union of Operating Engineers, Local Union No. 12, herein referred to as the "Union".

Article I—Coverage

A. This Agreement shall apply to and cover all workmen of the Employer in the classifications set forth in Appendix "A", employed to perform or performing construction work, including but not limited to building construction, heavy, highway, and engineering construction, and field survey work. It shall also include all maintenance and repair work in the Employer's permanent yards and shops and field repair, in Southern California, more particularly described as the counties of Imperial, Inyo, Kern, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura.

B. All work performed in the Employer's warehouses, shops and yards, which have been particularly provided or set up to handle work in connection with a job or project covered by the terms of

this Agreement, and all of the production or fabrication of materials by the Employer, or sub-contractor, for use on the project, shall be subject to the terms and conditions of this Agreement.

C. All work performed by the Employer, and all services rendered for the Employer, as herein defined, by the workmen, shall be rendered in accordance with each and all of the terms and provisions hereof.

D. If the Employer, party hereto, shall sub-contract work, as defined herein, provision shall be made in such sub-contract for the observance of the terms of this Agreement by said sub-contractor. A sub-contractor is defined as any person, firm or corporation who agrees, under contract with the general contractor or his sub-contractor, to perform on the job site any part or portion of the work covered by the contract, including the operation of equipment, performance of labor, and the furnishing and installation of materials.

E. The loading and unloading of equipment which is operated by workmen covered by this Agreement or the transportation of such equipment by means of its own power, shall be performed by workmen covered by this Agreement. Nothing herein contained shall be construed to prohibit the normal delivery of freight by common carrier.

Article II—Union Recognition

A. The Employer hereby recognizes the Union as the sole and exclusive collective bargaining representative of all employees of the Employer over

whom the Union has jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor, as of the date of this Agreement.

Subject to this understanding, the Employer shall have entire freedom of selectivity in hiring and may discharge any workman for any cause which he may deem sufficient, provided there shall be no discrimination on the part of the Employer against any workman, nor shall any such workman be discharged by reason of any Union activity not interfering with the proper performance of his work.

It is the intention of the parties that all workmen covered hereby shall be, or become forthwith upon employment, and remain continuously, members in good standing of the Union as a condition of employment. This provision shall become operative without further notice or amendment whenever amendments to, or judicial interpretations of, the Labor-Management Relations Act of 1947 remove the inhibitions against the application of this paragraph now existing under the present wording and judicial interpretations of that Act.

It is agreed that all workmen covered hereby shall be, or become, not more than thirty (30) days after employment, and remain continuously, members in good standing of the Union and shall remain available for work as a condition of employment.

B. In the employment of workmen for all work covered by this Agreement in the territory as de-

scribed in Article I, Paragraph A, the following provisions, subject to the conditions of Article II-A, above, shall govern:

1. The Union shall establish and maintain an open and non-discriminatory employment list for employment of workmen in the jurisdiction of the Union.

The Employer shall first call upon the Union, or its agent, for such men as he may from time to time need, and the Union, or its agent, shall immediately furnish to the Employer the required number of qualified and competent workmen of the classifications needed by the Employer.

The Union, or its agent, will furnish each such required competent workman entered on its list, to the Employer, by use of a written referral, and will furnish such workmen from the Union's listing in the following manner:

(a) Workmen who have been recently laid off or terminated by the Employer now desiring to re-employ the same workmen in that same area, provided they are available for employment.

(b) Workmen who have been employed by the Employer in the jurisdiction within the multiple-employer unit, covered by this Agreement and the AGC-BCA-AFL Southern California Master Labor Agreement, during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the Union and who are available for employment.

Reasonable advance notice, but not less than

twenty-four (24) hours prior to the required reporting time, shall be given by the Employer to the Union, or its agent, upon ordering such workmen; and, in the event that forty-eight (48) hours after such notice, the Union, or its agent, shall not furnish such workmen, the Employer may procure workmen from any other source or sources. If men are so employed, the Employer will immediately report to the Union, or its agent, each such workman by name.

Workmen employed by the Employer for a period of thirty-one (31) days continuously or accumulatively within the multiple-employer unit, covered by this Agreement and the AGC-BCA-AFL Southern California Master Labor Agreement, and procured in accordance with Article II, B-1 (c), above, or from other sources by the Employer himself, shall become members of the Union immediately, upon terms and qualifications not more burdensome than those applicable at such time to other applicants to the Union.

2. The Union will maintain District dispatching offices in the following cities, to provide service to the Employer:

District office: Los Angeles—Territory covered: Los Angeles County, except the Long Beach Area.

District office: Ventura—Territory covered: Ventura, Santa Barbara and San Luis Obispo Counties.

District office: Bakersfield—Territory covered: Kern, Inyo and Mono Counties.

District office: San Diego—Territory covered: San Diego and Imperial Counties.

District office: San Bernardino—Territory covered: San Bernardino and Riverside Counties.

District office: Long Beach; Territory covered: Orange County and the Long Beach Area of Los Angeles County.

When the Employer desires to transfer workmen from one District to another, he shall notify (by telephone or otherwise) the District Office in the District where the men are employed. The District Office which includes the area where the men are to be employed, will issue new referrals.

Workmen employed by the Employer pursuant to the terms of this Agreement and remaining in good standing in the Union, shall not be removed or transferred by the Union unless the prior approval of the Employer involved is obtained.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 3

The Constitution Governing the International Union of Operating Engineers and all Subdivisions, Bodies, Local Unions and Members Thereof

* * * * *

Minimum Dues Required

Art. XV. Section 3(d). Each Local Union issuing or required to issue the temporary permits described in this Article shall charge to and collect from those members within its territorial jurisdiction, to whom this Article shall apply, minimum weekly permit dues of \$2 in the case of each hoist-

ing and portable engineer and minimum monthly permit dues of \$2 in the case of each stationary engineer, and shall thereupon issue to each such member the Journeymen Engineer's Temporary Permit provided.

Permits Required by Applicants

Art. XV. Section 3(e). Each Local Union permitting its applicants for membership to engage at the craft, upon work under contract with, or control of, said Local Union, shall charge to and collect from each such applicant, and each such applicant shall be required to pay to it for the period involved, minimum weekly permit dues of \$2 in the case of each applicant hoisting and portable engineer or apprentice, and minimum monthly permit dues of \$2 in the case of each applicant stationary engineer or apprentice, and shall thereupon issue to each such applicant a temporary permit similar to the Journeyman Engineer's Temporary Permit provided in this Article.

* * * * *

Art. XV. Section 3(h). The General Executive Board is authorized and empowered to establish, amend, alter, and administer the terms, conditions, and rates under which the temporary permits herein provided shall be issued and enforced. No temporary permit as described in this article shall be issued to or used by any person who is not, at the time, either a member of the International Union of Operating Engineers or an applicant for membership therein and the attempted issuance of such

a permit above referred to by any officer or employe of the organization to any other person than those described herein shall be unauthorized, null and void.

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GENERAL COUNSEL'S EXHIBIT No. 4

By-Laws Local Union No. 12, International Union
of Operating Engineers

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Article II—Duties of Members

Section 1. In addition to the duties required by the Constitution and Ritual, every member will be required to conform to and abide by the hours, wages and conditions of employment provided for in the trade rules of Local Union No. 12, 12-A, 12-B, 12-C and 12-D, or as negotiated under signed agreements with this Local Union. Any member found guilty of entering into an individual or personal contract or agreement with his Employer, which serves to lower the wages, hours or conditions of employment established by this Local Union will be subject to disciplinary action in accordance with the provisions of Article XXV, Section (2) of the International Constitution.

Section 2. No member shall engage in conduct discreditable to the organization nor be guilty of any of the following acts:

(1) Failing to observe and follow customary procedures and regulations concerning assignment to

work, transfer of work, or reporting on 'out-of-work' list.

(2) Intoxication on the job.

(3) Wilfully damaging machinery or equipment.

(4) Leaving job without giving due notification to employer and union.

(5) Leaving equipment while in operation during working hours without being properly relieved.

(6) Engaging in unauthorized meetings or aiding in the formation of secret cliques among the members.

(7) Refusing to comply with lawful orders of business agents or officers of the Local Union.

(8) Accepting employment without the proper job clearance.

(9) Refusing to show dues book or receipts when requested to do so by business agent or job steward.

(10) Failing to report to Local Union concerning the employment on jobs of non-members or members in bad standing.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 8

[Letterhead of International Union of Operating
Engineers]

Working Record for Robert A. Holderby
From 9-29-51 to 8-20-53

9-20-51—Oswald Bros. (Screed 10-1-51)

10- 5-51—R. I. [Reported In*]

10- 6-51—Schroeder & Co. (Screed 10-8-51)

10-22-51—R. I. [Reported In*]

* Written in longhand.

- 10-23-51—Hickey-Kahn (Roller-Grade-Fired)
- 11-21-51—R. I. [Reported In*]
- 11- -51—McClain Const. (Tandem Roller)
- 11-30-51—R. I. (Back on List) [Reported In*]
- 12-11-51—Appl. Forfeited
- 3-31-52—Vernon Paving (Barber Green Spreader)
- 4- 7-52—R. I. [Reported In*]
- 5- 3-52—N. A. [No Answer*]
- 5- 9-52—N. A. [No Answer*]
- 5-20-52—Sent Card
- 7- 7-52—R. I. [Reported In*]
- 7-14-52—Webb & White (D-8 Tractor)
- 7-14-52—Winston Bros. (D-8 Sheepsfoot)
- 7-16-52—Cannot Opr. Cat.
- 7-28-52—Spann & Kenton (Roller)
- 7-29-52—R. I. [Reported In*]
- 7-29-52—Griffith Co. (Roller)
- 8- 5-52—Spann & Kenton (Hot Roller Opr.-
Tandem)
- 8- 8-52—Oswald (Barber Green Spreader)
- 8-11-52—R.I. No. Job [Reported In*]
- 8-11-52—Griffith Co. (Barber Green Spreader)
- 9-20-52—R. I. [Reported In*]
- 9-20-52—Ellis Const. (Roller Opr.)
- 9-24-52—R. I. [Reported In*]
- 9-25-52—Bongiovianni (Oiler)
- 9-27-52—Back on List
- 9-29-52—Vernon Paving (Hot Stuff Roller)
- 10- 1-52—S. W. Paving (Roller Opr.)
- 11-25-52—R. I. [Reported In*]

* Written in longhand.

- 11-25-52—G. J. Payne (Roller Opr.) I Day Job
11-29-52—Back on List
12- 8-52—Jerry Artukovich (Oil on Trencher)
2- 3-53—R. I. [Reported In*]
2-12-53—C. O. [Called office*]
2-16-53—C. G. Willis (D-4 Tractor Opr.)
2-26-53—R. I. 2:30 P. M. [Reported In*]
3-10-53—2:20 P.M. Cannot Work for So. West
Paving—Sick
3-11-53—4:10 P.M. C. O. [Called Office*]
3-12-53—City Rock Co. (One Day) Screed.
3-16-53—Back on List—1:35 P.M.
3-16-53—E. A. Irish (Oil on Trencher)
3-20-53—1:35 P.M. C. O. [Called Office*]
3-23-53—Pacific Iron & Steel (A-Frame Opr.)
3-30-53—R. I. Back on List [Reported In*]
3-30-53—Lipsett Steel—(A-Frame)
4- -8-53—4:10 P.M. N. H. L. M. (Contractor says
man hasn't shown up for three days.
Left him in bind—Called his home
and woman reports sick.)
4-13-53—R. I. 12:45 P.M. [Reported In*]
4-17-53—Sully Miller (Screed Opr.)
4-19-53—R. I. [Reported In*]
4-24-53—Schroeder Co. (Barber Green Asphalt
Spreader)
4-29-53—R. I. [Reported In*]
4-30-53—C. G. Willis & Son (D-8 Cat & Carryall)
5- 6-53—R. I. [Reported In*]

* Written in longhand.

- 5- 6-53—N. H. 3:50 P.M. [Not Home*]
- 5- 8-53—R. & J. Artukovich (Oiler on Trencher)
- 5-14-53—R. I. 1:15 P.M. [Reported In*]
- 5-14-53—Chas. Rounds (Oiler on Model 95 N. W.)
- 5-19-53—R. I. 12:45 P.M. [Reported In*]
- 5-19-53—So. West Paving (Screed Opr.)
- 5-27-53—Osborne Co. (Barber Green Spreader-
Paving Spreader)
- 5-28-53—Back on List (One Day Job)
- 5-29-53—Atlantic Const. (D-S Cat & Pulling
Sheepsfoot)
- 6- 4-53—R. I. 3:15 P.M. [Reported In*]
- 6- 5-53—NHLM-2:00 P.M. (City Rock-Hot Stuff
Roller) [Not home left message*]
- 6- 8-53—Job Cancelled—NA. NA. NA. NA, NA
[No answer*]
- 6- 9-53—8:05 A.M. NA. [No answer*]
- 6- 9-53—C. J. Payne (Roller Opr.)
- 6- 9-53—R. I. [Reported In*]
- 7- 8-53—R. A. Watson (Oil on N. W. Crane)
- 7- 9-53—Job Cancelled (Contractor contacting
Holderby)
- 7-14-53—R. I. [Reported In*]
- 8- 8-53—NHLM. [Not home, left message*]
- 8-20-53—NHLM. [Not home, left message*]
- 8-20-53—Co. 2:30 P.M. [Called office*]

* Written in longhand.

GENERAL COUNSEL'S EXHIBIT No. 10

Robert Holderby No. 557-28-7861

8-20-53—Ca 2:30

4- 6-54—Ca Wanted booth ph. no.

4- 8-54—Gave new phone no.

4- 9-54—Wants to oil

5- 4-54—Checked phone no.

5-20-54—8:50 a.m. By.

5-24-54—By. 10:15 a.m.

5-24-54—In hall no. transp.

6- 3-54—Job on Barber Green

Too. far 1:30 p.m.

6- 3-54—Ball & Harms (W. Wheel 10 oper)

6-14-54—R. I. 8:05 a.m.

6-14-54—Gone new ph. no.

6-16-54—Ca gave new phone no.

6-16-54—Ca. 4:30 p.m.

6-18-54—Ca. 10:10 a.m.

6-18-54—Ca

6-18-54—Macco (Monitaowac oiler)

7-14-54—R. I. 2:30 P. M.

7-22-54—McDonald & Kruze

7-22-54—Ca 12:40 pm

8-13-54—R. I. 2:00 p.m.

8-16-54—Gave new phone no.

8-19-54—Schroeder Co. (Screed Opr.)

8-24-54—R.I.

8-24-54—Refused concrete finishing job. Too far

8-26-54—Ca. 12:00

8-26-54—Osborne—Roller Oper.

9-28-54—R. I. 12:25 P.M.

10- 7-54—In hall 2:30 p.m.

10-11-54—In Hall

In the United States Court of Appeals
for the Ninth Circuit

No. 15003

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 12, AFL,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, “International Union of Operating Engineers, Local No. 12, AFL, and Robert A. Hold-erby, An Individual,” Case No. 21-CB-564; “Inter-national Union of Operating Engineers, Local No. 12, AFL, and Frederick R. Hummel, An Individ-ual,” Case No. 21-CB-536; and “International Union of Operating Engineers, Local No. 12, AFL, and Hoyt Covert, An Individual,” Case No. 21-CB-586 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was en-

tered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony of William E. Coombs taken before Trial Examiner Maurice M. Miller on September 29, 1954 in Case No. 21-CB-548, made a part of the record by stipulation of the parties (see transcript of testimony, page 147 in Case Nos. 21-CB-564, 21-CB-536 and 21-CB-586). (Annexed ot item 2 herein).

2. Stenographic transcript of testimony taken before Trial Examiner Thomas S. Wilson on October 18 and 19, 1954, together with all exhibits introduced in evidence.

3. Copy of Trial Examiner's Intermediate Report (annexed to item 5 hereof) and order transferring cases to the Board, both issued December 14, 1954, together with affidavit of service and United States Post Office return receipts thereof.

4. General Counsel's exceptions to the Intermediate Report received by the Board on **January 27, 1955.**

5. Copy of Decision and Order issued by the National Labor Relations Board on August 15, 1955, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary

of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 20th day of January, 1956.

[Seal] /s/ FRANK M. KLEILER,
 Executive Secretary, National
 Labor Relations Board

[Endorsed]: No. 15003. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Union of Operating Engineers, Local No. 12, AFL, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: January 23, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
 the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15003

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 12, AFL,
Respondent.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, International Union of Operating Engineers, Local No. 12, AFL, its officers, agents, successors, or assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "International Union of Operating Engineers, Local No. 12, AFL and Robert A. Hold-erby, An Individual," Case No. 21-CB-564; "In-ternational Union of Operating Engineers, Local No. 12, AFL and Frederick R. Hummel, An In-dividual," Case No. 21-CB-536; and "International

Union of Operating Engineers, Local No. 12, AFL and Hoyt Covert, An Individual," Case No. 21-CB-586.

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interest of its members in the State of California, within this judicial circuit where the unfair labor practice occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on August 15, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, International Union of Operating Engineers, Local No. 12, AFL, its officers, agents, successors, or assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition

and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondent herein, and requiring Respondent, its officers, agents, successors, or assigns to comply therewith.

Dated at Washington, D. C., this 20th day of January, 1956.

NATIONAL LABOR RELATIONS
BOARD

/s/ By MARCEL MALLET-PREVOST,
Assistant General Counsel

[Endorsed]: Filed January 23, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

BOARD'S STATEMENT OF POINT AND
DESIGNATION OF RECORD

I. Statement of Point Relied Upon

The Board properly determined that respondent's discriminatory operation of its dispatch system and its denial of job referrals to Robert A. Hold-erby constituted violations of Section 8 (b) (1) (A) and (2) of the National Labor Relations Act, as amended.

II. Designation of Parts of the Record to be
Printed

1. The petition for enforcement.
2. The decision and order of the Board including the Trial Examiner's Intermediate Report.
3. The following portions of the stenographic transcript of hearing before the Trial Examiner:

Page 4 line 1 to page 4 line 17, page 8 line 20 to page 9 line 5, page 10 line 3 to page 39 line 25, page 50 line 17 to page 95 line 17, page 97 line 18 to page 98 line 9, page 98 line 20 to page 105 line 13, page 106 line 11 to page 106 line 18, page 118 line 9 to page 143 line 20.

4. The following exhibits of General Counsel to the extent indicated:

G. C. Ex. 2, but only Articles I and II thereof.

G. C. Ex. 3, but only Article XV, Secs. 3(d), (e), and (h).

G. C. Ex. 4, but only Article II, Secs. 1 and 2.

G. C. Ex. 8 in full.

G. C. Ex. 10 in full.

Dated at Washington, D. C., this 20th day of January, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board

[Endorsed]: Filed January 23, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF RESPONDENT, I. U. O. E.,
LOCAL No. 12, AFL

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now the International Union of Operating Engineers, Local No. 12, AFL, Respondent, for itself and no other, and files this its Answer to the Petition for Enforcement of an Order of the National Labor Relations Board, and denies, admits and alleges as follows:

I.

Answering Paragraph I of the Petition for Enforcement of the Order of The National Labor Relations Board, the respondent, International Union of Operating Engineers, Local No. 12, AFL, admits that respondent is a labor organization engaged in promoting and protecting the interests of its respective members in the State of California, and that it is within the judicial district of this honorable court, but denies that unfair labor practices involving this respondent occurred within this judicial circuit or within any other judicial circuit. Respondent International Union of Operating Engineers, Local No. 12, AFL, admits that this court has jurisdiction under Section 10-E of the National Labor Relations Act, as amended, to review purported orders of the National Labor Relations Board.

II.

Respondent International Union of Operating Engineers, Local No. 12, AFL, admits that on August 15, 1955, the National Labor Relations Board stated its Findings of Fact and Conclusions of Law and issued a purported order directed to respondent, its officers, representatives, agents, successors and assigns. Respondent International Union of Operating Engineers, Local No. 12, AFL, further admits that a copy of said decision and purported order was served upon respondent Union Local No. 12 on or about the same date.

III.

Respondent International Union of Operating Engineers, Local No. 12, AFL, for itself and no other, answering Paragraph III of the Petition of the National Labor Relations Board to enforce its order, states that it has no knowledge that the National Labor Relations Board is certifying and filing with this honorable court a transcript of the entire record of the consolidated proceedings before the Board, including the pleadings, testimony, evidence, Findings of Fact, Conclusions of Law, and the order of the Board sought to be enforced and, therefore, denies each and every allegation contained in said Paragraph III.

IV.

International Union of Operating Engineers, Local No. 12, AFL, further answering said Petition alleges that the said Findings of Fact and Con-

clusions of Law, referred to in Paragraphs II and III of the said Petition for Enforcement, are not based upon substantial evidence on the record considered as a whole and, therefore, are void and of no effect.

V.

Respondent further answering alleges that the purported order of the National Labor Relations Board here sought to be enforced is not based upon substantial evidence on the record considered as a whole and, therefore, is null and void and of no effect.

VI.

International Union of Operating Engineers, Local No. 12, AFL further answering said Petition for Enforcement alleges that the Findings and Conclusions of the Board that respondent violated Sections 8 (b) (2), 8 (b) (1) (A), Section 2 (6) and (7) are not supported by substantial evidence on the record considered as a whole.

VII.

International Union of Operating Engineers, Local No. 12, AFL further answering said Petition for Enforcement alleges that the National Labor Relations Board does not have jurisdiction to issue an order in the above entitled matter within the meaning of the National Labor Relations Act and, further, that it did not effectuate the policies of the Act or the Board to do so.

Wherefore, having fully answered the Petition for Enforcement of the National Labor Relations

Board, International Union of Operating Engineers, Local No. 12, AFL, a respondent herein, respectfully prays that the Petition for Enforcement of an order of the National Labor Relations Board be dismissed as to it and that said order of the National Labor Relations Board, with respect to respondent be fully set aside.

/s/ DAVID SOKOL,

Attorney for International Union of Operating Engineers, Local No. 12, AFL

Duly Verified.

[Endorsed]: Filed January 26, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

RESPONDENT'S STATEMENT OF POINTS

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

International Union of Operating Engineers, Local No. 12, AFL, respondent in the above-entitled proceeding, in conformity with the rules of this court, hereby states the following points upon which it intends to rely.

I.

The National Labor Relations Board is without jurisdiction over respondent and the subject matter herein involved.

II.

That the Board's Findings of Fact and Conclusions of Law that respondent International Union of Operating Engineers, Local No. 12, AFL, violated Sections 8 (b) (2), 8 (b) (1) (A) and 2 (6) and (7) of the National Labor Relations Act, as amended, are not supported by substantial evidence on the record considered as a whole and are contrary to law.

III.

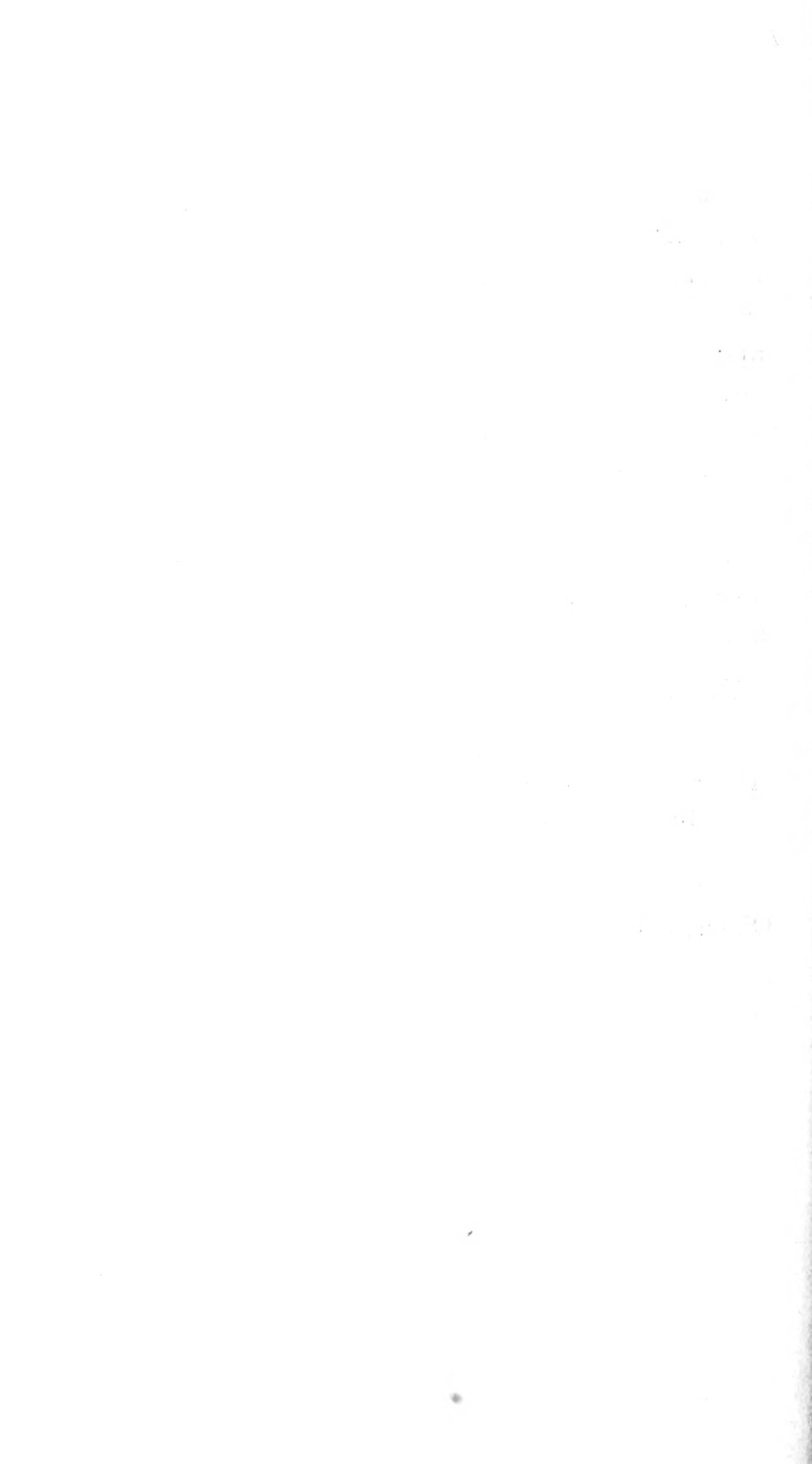
That the National Labor Relations Act, as amended, deprives respondent of due process of law and is otherwise unconstitutional and void.

Respectfully submitted,

/s/ DAVID SOKOL,

Attorney for International Union of Operating Engineers, Local No. 12, AFL.

[Endorsed]: Filed January 26, 1956. Paul P. O'Brien, Clerk.



No. 15003

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL
No. 12, AFL, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEOPHIL C. KAMMHOLZ, .
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ARNOLD ORDMAN,
*Attorney,
National Labor Relations Board.*

FILED

APR 23 1956

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15003

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL
No. 12, AFL, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Labor Relations Board for enforcement of its order issued August 15, 1955, against respondent, herein called Local 12. The Board's decision and order (R. 25-39)¹ are reported at 113 NLRB No. 67. This Court has jurisdiction under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), the unfair labor practices having occurred in and around Los Angeles, California, within this judicial circuit.

¹ References to portions of the printed record are designated "R." Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings and later references are to the supporting evidence.

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

Local 12 together with other construction trade unions has a collective bargaining agreement with Associated General Contractors, herein called AGC (R. 29; 51). Under this agreement Local 12 is authorized to dispatch certain classifications of workmen for employment with the building and construction contractors who comprise the membership of AGC (R. 30-31; 56, 151-153).² The legality of the agreement as such is not in issue. The Board found, however, (R. 39-40), that Local 12 discriminatorily operated the dispatch system in violation of Section 8 (b) (1) (A) and (2) of the Act by giving preference in job referrals to Local 12 members, by requiring non-union applicants for jobs to apply for membership in Local 12 immediately upon their first job referral, and by imposing a weekly permit fee on non-union members when working in its jurisdiction with the AGC unit. The Board found an additional violation of the cited statutory provisions in Local 12's removal of Holderby's name from the preferred list of employee applicants because of his expulsion from Local 12 (R. 40). The evidence in support of the Board's findings is briefly summarized.

A. *The dispatch system set forth in the agreement*

At all times relevant the collective bargaining agreement between Local 12 and its sister unions on the

² The parties stipulated before the Board that the testimony in an earlier proceeding relating to the business of AGC be considered as part of the record in the instant case (R. 28). That testimony established that AGC members during 1953 and 1954 did several million dollars worth of construction work at national defense installations, thus affording ample basis for the Board's assertion of jurisdiction here (*ibid.*).

one hand and AGC on the other contained in Article II-A an exclusive recognition clause, a recital of the employers' freedom to hire and discharge employees subject to the conditions imposed by the agreement, and a union-security clause requiring employees of AGC members covered by the agreement to become members of the appropriate local union not more than thirty days after being employed (R. 29-30; 150-151).³ Following these provisions, Article II-B sets up a dispatch system in the following terms (R. 30-31; 151-152):

B. That in the employment of workmen for all work covered by this Agreement in the territory above-described, the following provisions, subject to the conditions of Article II-A, above shall govern:

1. That the Local Unions shall establish and maintain open and nondiscriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local Union of each particular trade.

That the Contractors shall first call upon the respective Local Unions having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local Unions, or their Agents, shall immediately furnish to the Contractors the required number of qualified and competent workmen and skilled me-

³ The union-security clause conforms, so far as appears, with the limitations placed upon such arrangements by Section 8 (a) (3) of the Act. Article II-A of the agreement also states the intention of the parties thereto that a closed shop become operative as soon as permissible under the Act, whether by way of amendment to, or judicial interpretation of, the Act.

chanics of the classifications needed by the Contractors.

That the respective Local Unions, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the Contractors by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local Unions' listing in the following manner:

(a) Workmen who have recently been laid off or terminated in that respective Local Union's work and area jurisdiction by the Contractors desiring to reemploy the same workmen in the same area provided they are available for employment.

(b) Workmen who have been employed by Contractors in the respective Local Union's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the respective Local Union having work and area jurisdiction and who are available for employment.⁴

B. Local 12's discriminatory operation of the dispatch system

Pursuant to the collective bargaining agreement, AGC members called Local 12 whenever they required

⁴ Article 11-B further provides that if the Local Unions do not within 48 hours after appropriate notice from the Contractors furnish the required workmen, the Contractors are entitled to obtain such workmen from other sources but are to report the names of such workmen to the Local Union having work and area jurisdiction.

operating engineers or other classifications of employees falling under the jurisdiction of that Local (R. 32; 59-60). As indicated in the preceding section, the agreement gave first priority in job referrals to workmen who had recently been laid off or terminated and whom the employer wanted to rehire. Apart from these instances, the agreement gave preference to workmen who had been employed by AGC members during the previous ten years as against other applicants for employment.

The practice of Local 12 under this agreement, however, was to maintain two separate categories of workmen who were out of work and available for dispatch. The first category, headed "Members," included all members of Local 12 who were seeking work whether or not they had worked for AGC members during the previous ten years; the second category, denominated "Applicants and Others," included members of sister locals of Local 12 who had transferred into the geographical area covered by Local 12 as well as non-union members who applied to Local 12 for dispatch (R. 32; 68-69, 72-73). When an employer called in for workmen, Local 12 would first check the "Members" list for workmen having the required skills and the individual longest out of work would be dispatched (R. 33; 72-73).⁵ Only if that list contained no qualified workmen would Local 12 resort to the "Applicants and Others" list (R. 33; 69, 72).

In addition, notwithstanding that applicants referred

⁵ An employer's request for the return of a specific workman would be honored regardless of his position on the "Members" list (R. 35). McNeel, the Local 12 representative, could not recall any instance, however, where a specific man on the "Applicants and Others" list was requested or dispatched as against qualified workmen on the "Members" list (*ibid.*).

for employment had, under the terms of the agreement, thirty days in which to join the Union, Local 12 required non-union applicants to apply for membership in Local 12 immediately upon their first referral and required further that they pay a weekly work permit fee (R. 33-34; 134-135, 154-155). This practice was pursuant to the controlling provisions in the constitution of Local 12's parent International Union, under which no non-union workman could be dispatched for employment unless he were an applicant for membership in the International, and unless he paid a permit fee of at least two dollars (R. 33, n. 3; 154-155).⁶

Upon the foregoing facts the Trial Examiner concluded (R. 13-14) that the preference in employment referrals given workmen on the "Members" list as against those on the "Applicants and Others" list was not inconsistent with the terms of the agreement and was not discriminatory under the Act. In his view, the requirement of the agreement that all employees of AGC become members of Local 12 after thirty days had the effect of equating former employment and Local 12 membership so that the list of names would be the same whether it was compiled on the basis of former employment or on the basis of Local 12 membership (R. 14). The Trial Examiner concluded also that the practice of Local 12 in requiring "Applicants and Others" to apply for membership at the time of their first job referral could not be regarded as proof that such application was a condition precedent to

⁶ On occasion, however, applicants for membership were permitted to report to their jobs without paying any part of the initiation fee technically due when the membership application was submitted (R. 34; 133).

job referral (R. 13). Accordingly, the Trial Examiner recommended dismissal of the complaint (R. 25).

The Board, one member dissenting, reversed the Trial Examiner and found that Local 12 had by the foregoing conduct violated Section 8 (b) (2) and (1) (A) of the Act (R. 35-38, 45-47). The Board differed with the Trial Examiner's conclusion that membership in Local 12 could be equated with prior employment with AGC employers. The Board noted that Local 12 members were given preference whether or not they had ever worked before for AGC members and noted further, as more fully explained below, that Employee Holderby was removed from the preferred "Members" list after his expulsion from Local 12 despite his right to preference under the agreement as a former employee (R. 36). The Board also rejected the Trial Examiner's conclusion that the Local 12 practice of requiring a membership application from non-union members immediately upon their first job referral was not a condition precedent to obtaining employment and that this practice, dictated by the constitution of the parent International Union, could be explained on the theory that all applicants voluntarily applied for such membership immediately (R. 36-37). Finally, the Board found that Local 12's practice of extracting a weekly work permit fee from non-members of Local 12, though likewise dictated by the constitution and by-laws, was not authorized by the agreement and constituted a further discrimination in violation of Section 8 (b) (2) and (1) (A) of the Act (R. 38)⁷

⁷ The Trial Examiner, while finding that a weekly work permit fee was imposed upon non-members of Local 12, made no finding as to whether this practice was in violation of the Act.

C. The discrimination against Holderby

Robert A. Holderby became a member of Local 12 in November 1952 (R. 78). In January 1953 he was suspended for dues delinquency. Pursuant to Holderby's request for reinstatement, Local 12 wrote him under date of March 17, 1953, that he would be reinstated upon payment of certain dues and fees which had accrued. Three months later, however, in June 1953, Local 12 wrote Holderby again, revoking his reinstatement and returning to him all initiation fees, dues, and permit fees which he had theretofore paid (R. 34).⁸

Prior to the June 1953 action of Local 12 rejecting Holderby's request for reinstatement, Holderby's name had appeared on the "Members" list and he had regularly been referred for employment by Local 12 (R. 38; 92, 157-160). Thereafter, however, his name was removed from the preferred "Members" list and placed at the top of the "Applicants and Others" list (R. 38; 89-90, 68). From that time on and for approximately twelve months, Holderby, despite frequent visits to the Local 12 office, was never dispatched to a job although on one or two occasions the Local 12 dispatcher attempted to notify him of a possible referral (R. 34; 93-95). For about four months during this period Holderby was employed as a truck salesman working on commission (R. 34-35; 103-104). Even during these months, however, Holderby was available for work as an operating engineer and throughout the entire period he made earnest, albeit unsuccessful, efforts to obtain

⁸ The letters herein referred to were admitted into evidence as part of General Counsel's Exhibit 6 (R. 86-87). Since the text of these letters is set forth in the Intermediate Report (R. 15-17), the exhibit has not been reproduced in the Record.

construction work by applying to Local 12 for referrals and by applying personally to contractors (R. 35; 109-112).

On June 3, 1954, two days after the issuance of the complaint herein, Local 12 offered Holderby two jobs and continued to dispatch him fairly regularly until shortly before the hearing, when again the referrals ceased (R. 34; 97, 161).

The Trial Examiner concluded that in order to establish unlawful discrimination against Holderby, "it was incumbent upon General Counsel to prove there were jobs available for employees with Holderby's capabilities and, further, that he, Holderby, was not referred to such jobs" (R. 24). Since in the Trial Examiner's view, such proof was not presented, he concluded that no discrimination against Holderby had been established (*ibid*). The Board, one member dissenting, disagreed with the Trial Examiner. It held that "the mere removal of Holderby's name from the contractual preferred list because he had lost his Union membership was a violation of the Act, and that the extent to which Holderby actually suffered loss of employment is a matter for determination at the compliance stage of the proceeding" (R. 38-39). Denial of equal access to jobs, the Board held, was in itself and without more a restrictive imposition in violation of the Act (R. 39).^{8a}

^{8a} As the record shows, the findings of fact herein are based on virtually undisputed evidence. The Board's reversal of the Trial Examiner, therefore, springs only from its different view of the law applicable to the facts. In this frame of reference, where credibility is not involved, the Trial Examiner's findings, of course are entitled to no special weight. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 492, 496; *F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364; *N.L.R.B. v. Globe Wireless, Ltd.*, 193 F.2d 748, 750 (C.A. 9).

II. The Board's Order

The Board's order requires Local 12 to cease and desist from the several unfair labor practices found and from like or related unfair labor practices. Affirmatively, the order requires Local 12 to make Holderby whole for any loss of earnings suffered because of the discrimination and to post appropriate notices (R. 42-45).

SUMMARY OF ARGUMENT

A. Apart from the narrow exception afforded by the union security provisions of Section 8 (a) (3) of the Act, settled law precludes an employer from requiring membership in a labor organization as a condition of employment and likewise precludes a union from causing or attempting to cause an employer to impose such a requirement. Application of these settled principles establishes the propriety of the Board's finding that Local 12 violated Section 8 (b) (1) (A) and (2) of the Act when it made membership in Local 12 a criterion for preference in job referrals. The fact that Local 12 members who had never worked for AGC members before were given preference and that Robert Holderby, on termination of his Local 12 membership, was denied such preference adequately refutes the contention that Local 12 membership could be equated with prior AGC employment experience as a basis for according job referral preference.

Local 12's practice of requiring non-union members to apply for membership in Local 12 immediately upon their first job referral is likewise violative of Section 8 (b) (1) (A) and (2) of the Act. Even under a valid union-security agreement, employees have a thirty-day grace period before they are required to apply for union membership. Local 12's claim that it exercised

no compulsion, but that all non-union workmen voluntarily applied for membership immediately upon their first job referral, is wholly ingenuous. Further indication that such applications were the product of Local 12 compulsion is afforded by the constitution of Local 12's parent International which prohibits its local unions from issuing temporary work permits to anyone not a member of the International or an applicant for membership.

Insofar as Local 12 extracted work permit fees from non-members as against members, it likewise imposed an unlawful condition upon employment. No suggestion is made that the imposition of these fees, authorization for which is also found in the constitution of the parent International, was in any way dictated by or required for the operation of the dispatch system.

The view of the dissenting Board member that no finding of Section 8 (b) (2) violation by Local 12 could be made here because of the absence of evidence showing a violation of Section 8 (a) (3) by AGC is vulnerable on two grounds. In the first place, AGC may not, by delegating its hiring function, evade its statutory obligation to see that hiring is done in a non-discriminatory manner. In the second place, a violation of Section 8 (b) (2) is sufficiently established by "a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8 (a) (3)." *Radio Officers v. N. L. R. B.*, 347 U. S. 17, 53.

B. For reasons already stated, the removal of Robert Holderby's name from the list of those preferred for job referrals merely because his Local 12 membership was terminated is plainly violative of Section 8 (b) (1) (A) and (2) of the Act. The deprivation of the prefer-

ence is itself sufficient showing of a violation (see *N. L. R. B. v. Swinerton & Walberg Co.*, 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814), and no evidence need be adduced to show that jobs were actually available which Holderby would have received but for the discrimination against him. The latter showing, which is relevant only for purposes of determining the amount necessary to make Holderby whole for lost earnings, is appropriately left for post-decree compliance proceedings.

ARGUMENT

The Board Properly Determined that Local 12's Discriminatory Operation of Its Dispatch System and Its Denial of Job Referrals to Robert Holderby Constituted Violations of Section 8 (b) (1) (A) and (2) of the Act

A. The discriminatory operation of the dispatch system

Settled law establishes that, subject to one sharply defined exception, the rights of an employee or an applicant for employment may not be abridged or terminated because of his membership or nonmembership in a labor organization. Sections 7, 8 (a) (3), 8 (b) (2) of the Act.⁹ Accordingly, this Court has uniformly held that an employer violates Section 8 (a) (3) and (1) of the Act if he requires membership in a labor organization as a condition precedent to employment. See, e. g. *N. L. R. B. v. Swinerton & Walberg Co.*, 202

⁹ The exception to this principle is set forth in the proviso to Section 8 (a) (3) of the Act which provides that an employer and a union may under appropriate circumstances enter into an agreement requiring employees to become members of the union *on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is later*. While the collective bargaining agreement between Local 12 and AGC included such a union-security provision, that provision is only indirectly involved in the instant case. See, *infra*, p. 14.

F. 2d 511, 514, certiorari denied, 346 U. S. 814; *N. L. R. B. v. Cantrall*, 201 F. 2d 853, 855-856, certiorari denied, 345 U. S. 996. This Court has likewise repeatedly held that a union violates Section 8 (b) (2) as well as Section 8 (b) (1) (A) of the Act where, either by written agreement or by practice, it causes or attempts to cause an employer to engage in such discrimination. *N. L. R. B. v. ILWU*, 210 F. 2d 581; *N. L. R. B. v. ILWU, Local 10*, 214 F. 2d 778; *N. L. R. B. v. Waterfront Employers of Washington*, 211 F. 2d 946; *N. L. R. B. v. Alaska Steamship Company*, 211 F. 2d 357.

Applying these settled principles to the facts of the instant case, we believe the record establishes beyond cavil the propriety of the Board's finding that Local 12 violated Section 8 (b) (1) (A) and (2) of the Act both in its operation of the dispatch system and in its treatment of Robert A. Holderby pursuant to that system. As already indicated (*supra*, pp. 4-6), the dispatch system put into operation by Local 12 departed widely from the system outlined in the agreement which established a scheme of preferences for job referrals predicated solely on prior employment with AGC members.¹⁰ Thus, Local 12 included in its preferred category for job referrals all members of Local 12 whether or not they had had prior employment with AGC members (*supra*, p. 5). Similarly, Robert A. Holderby, who qualified for preference under the terms of the collective agreement by virtue of his prior employment with AGC members, was dropped from the preferred category once his Local 12 membership terminated. To the extent that this practice departed from the scheme contemplated by the agreement and made Local 12

¹⁰ The legality of that agreement is not in issue in this proceeding. Compare *N.L.R.B. v. ILWU*, 210 F. 2d 581, 583, n. 1 (C.A. 9).

membership the criterion for preference in job referrals, it was plainly illegal.¹¹

For the same reasons, the Board was warranted in rejecting the Trial Examiner's view, urged by Local 12, that the workmen on its "Members" list corresponded exactly to those who would qualify for preference on the prior employment criterion contemplated by the agreement. This view was predicated on the thesis that by operation of the union security clause in the AGC agreement, all former employees of AGC would necessarily have become Local 12 members after thirty days, and hence eligible for preference under the agreement. Apart from any other infirmity in this line of argument, the view here advanced affords no warrant for the preference accorded members of Local 12 who had never worked for AGC members or the withholding of preference from Holderby whose prior employment by AGC members would in and of itself qualify him for preference under the agreement.

Local 12's practice of requiring non-union members to apply for membership in Local 12 immediately upon their first job referral is likewise in derogation of the Act (*supra*, pp. 5-6). As already noted (p. 12, n. 9), the requirement of union membership as a condition of employment can only be imposed pursuant to a valid union security provision. And even under such a provision, the Act affords employees a thirty-day grace period during which they are exempt from such a requirement. Such a thirty-day provision was incorporated in the AGC agreement. But as in the case of job

¹¹ Had the agreement incorporated union membership as criterion for employment preference the agreement itself would have been vulnerable. See *N.L.R.B. v. Alaska Steamship Company*, 211 F. 2d 357, 359 (C.A. 9).

referral preference, heretofore discussed, the legality of the contractual arrangement does not exonerate Local 12 from its unlawful departure from that arrangement when it insists on membership applications forthwith. Nor can Local 12 derive any comfort from the suggestion, adopted by the Trial Examiner, that it imposed no such requirement but that all non-union applicants voluntarily applied for membership of their own free will as soon as they received job referral. Such an assumption, we submit, is, at the very least, ingenuous. Moreover, it ignores, as the Board found (R. 37), "the practical situation in which such applicants were placed." Job applicants were aware that their only chance of obtaining employment with AGC members was through Local 12's dispatching office, and the penalties of incurring the disfavor of Local 12 are dramatically shown in its treatment of Robert A. Holderby. Significantly, too, the constitution of Local 12's parent International specifically prohibits a local union from issuing a temporary work permit to anyone who is not either a member of the International or an applicant for membership (*supra*, p.). Under all these circumstances, the Board was amply warranted in concluding that the uniform practice followed by non-union applicants of applying for membership in Local 12 immediately upon their first job referral was no mere happenstance but rather the product of Local 12 compulsion.

The third violation found by the Board consisted in the imposition by Local 12 of a weekly work permit fee on nonunion applicants as a condition of their referral for employment. No such fee was imposed on union members. Here, again, the AGC agreement contained no such provision but the constitution of the Interna-

tional dictated the practice followed by Local 12 (*supra*, p. 7). As the Board noted, "Respondent neither **con-**tended nor proved that this special charge levied upon non-union applicants was in any way related to the cost of operating the dispatch system for the benefit of such employees" (R. 38). This disparity of treatment, based as it was on union membership, was plainly violative of Section 8 (b) (1) (A) and insofar as it served to preclude nonholders of work permits from access to employment, it was further violative of Section 8 (b) (2).

It is urged in the dissent that a finding of violation of Section 8 (b) (2) on any of the foregoing grounds is precluded by the literal language of that section (R. 45-47), and that a union violates Section 8 (b) (2) only when it "cause[s] or attempt[s] to cause an employer to discriminate against an employee in violation of subsection (a) (3)." Since the record here demonstrates no more than that AGC entered into an agreement, the legality of which is not challenged, and since no independent evidence of discrimination on the part of AGC is shown, it is argued that a violation of Section 8 (a) (3) is not established and the allegation of a Section 8 (b) (2) violation cannot be sustained.

We submit that this view is vulnerable on at least two separate grounds. In the first place, as the Board found (R. 36, n. 5), AGC may not by delegating its hiring function to Local 12 relieve itself of its primary statutory obligation not to discriminate as to hire or tenure of employment on the basis of union membership. And where it has delegated that function, its responsibility at the very least is to see that the

delegated power is not exercised in a discriminatory manner. To the extent that it fails to carry out that responsibility, it has in a very real sense itself been guilty of discrimination.

In the second place, the Supreme Court noted in *Radio Officers v. N.L.R.B.*, 347 U.S. 17, 53, that "a literal reading of [Section 8 (b) (2)] requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8 (a) (3)." ¹² An attempt to cause an employer to discriminate against an employee in violation of Section 8 (a) (3) would constitute a violation of Section 8 (b) (2) even if the employer resisted and refused to discriminate. By the same token, a union is not exonerated where it has so successfully masked its true purpose that the employer fulfills the union's discriminatory objective without knowledge that he has done so. Compare *N.L.R.B. v. Auchter Company*, 209 F. 2d 273, 277 (C.A. 5). Any other rule would put a premium on successful deception, a result clearly not contemplated or intended by the Act.

The proposition here advanced is no different in essence from the view frequently urged that a finding of a Section 8 (b) (2) violation against a union is precluded unless the employer putatively responsible for the Section 8 (a) (3) violation is joined in the proceeding. As the cited cases establish (*supra*, pp. 12-13), neither proposition is valid. The facts are undisputed here that absent reference by Local 12,

¹² Accord: *N.L.R.B. v. ILWU*, 210 F. 2d 581, 583-584 (C.A. 9); *N.L.R.B. v. Newspaper and Mail Deliverers' Union*, 192 F. 2d 654, 656-657 (C.A. 2), cited with approval in *Radio Officers*, and in turn citing with approval *National Union of Marine Cooks and Stewards*, 92 NLRB 877, 878.

applicants were precluded from access to AGC jobs. Local 12 imposed discriminatory requirements upon such access. The necessary consequence of this action was that AGC members did not hire applicants unless they were in compliance with these discriminatory requirements and a violation of Section 8 (b) (2) is plainly established. *N.L.R.B. v. ILWU*, 210 F. 2d 581, 584 (C.A. 9).

B. The discrimination against Robert A. Holderby

As shown in the Statement (pp. 8-9) Robert A. Holderby, as a member of Local 12, had been regularly referred to jobs with AGC members. When his Local 12 membership was terminated, however, Holderby was dropped from the preferred "Members" category and his regular referrals ceased notwithstanding that under the agreement his right to preference still obtained because of his prior employment history with AGC members. For reasons set forth in the preceding section, this action constituted a violation of Section 8 (b) (2) and (1) (A) of the Act. And see especially, *N.L.R.B. v. Alaska Steamship Company*, 211 F. 2d 357, 360 (C.A. 9).^{12a}

Apart from general contentions already discussed, Local 12 argues that no discrimination can be found in Holderby's case absent proof that there were jobs available to which he would have been referred but for the

^{12a} For obvious reasons Local 12 did not invoke its union security agreement to justify its discrimination against Holderby. As shown in the Statement, p. 8, Holderby had in March pursuant to Local 12's letter made up his dues delinquency and had paid three months' dues in advance. Consequently, dues delinquency could afford no basis for the termination of Holderby's Local 12 membership in June.

removal of his name from the "Members" list. The Trial Examiner so found (R. 24). The Board, however, reached a contrary conclusion. The Board said (R. 39):

It is clear that, for the purposes of job referral, Local 12 refused to consider Holderby on an equal basis with individuals who were entitled to preference under the AGC agreement, simply because he was no longer a member of Local 12. "This denial of equal access to the available jobs was in itself and without more a restrictive imposition in violation of the Act." [Citing *N.L.R.B. v. International Brotherhood of Boilermakers*, 218 F. 2d 299, 304 (C.A. 3).¹³

Accordingly, the Board ordered Local 12 to make Holderby whole for earnings as a result of the discriminatory deprivation of his preferred referral status. Recognizing, however, the casual and occasional nature of referrals, the Board, in accordance with its usual practice, left for determination in post-decree compliance proceedings the determination of the extent to which Holderby actually suffered a loss in earnings. *Boilermakers, supra*,¹⁴

¹³ Accord: *N.L.R.B. v. Swinerton & Walberg Co.*, 202 F. 2d 511, 515 (C.A. 9), certiorari denied, 346 U.S. 814; *Alaska Steamship, supra*.

¹⁴ For a description of the Board's post-decree compliance proceedings see *N.L.R.B. v. Bird Machine Co.*, 174 F. 2d 404 (C.A. 1) and cases there cited.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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APRIL 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

* * * * *

Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation

of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Sec. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying,

and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *



No. 15003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL No. 12, A. F. L.,

Respondent.

RESPONDENT'S BRIEF.

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FILED

MAY 14 1956

PAUL P. O'BRIEN, CLERK

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Respondent.

RESPONDENT'S BRIEF.

I.

STATEMENT OF THE CASE.

A. The Board's Findings Are Not Based Upon Any Substantial Evidence.

The Board, in reversing the trial examiner, found:

(1) That respondent Union operated the dispatch system in a discriminatory manner by:

(a) Giving preference in job referrals to its members;

(b) By *requiring* non-Union applicants to apply for membership in the Union immediately upon their first job referral;

(c) By imposing a weekly permit fee on non-Union members; and

(d) By removing Holderby's name from the "Members" list to the "Applicants and Others" list.

There is no evidence in the record to support the foregoing findings.

The agreement between the Union and the Associated General Contractors admittedly gave preference to workmen who had been employed within the multiple employer unit during the previous ten years. Accordingly, in compliance with this provision, the Union had an "Out of Work" list, but separately listed thereon "Members" (since they had worked in the multiple employer unit during the previous ten years), and had another heading: "Applicants and Others."

The Board, in reversing the trial examiner, held that the Union had given preference in job referrals to its members. The trial examiner, who heard the evidence, found that by operation of the Union security clause in the agreement, former employees of the A. G. C. would necessarily have become local 12 members and hence were eligible for preference. [Tr. p. 12.] This finding of the trial examiner is supported by the evidence, whereas the finding by the Board is not. The only evidence on the point is the testimony by Harold M. McNeel [Tr. pp. 143, 144]:

"Q. The non-members, were they persons who had never worked, so far as you know, in the multiple employer unit? A. I don't know that any of them had.

Q. You first dispatched the people under the contract, those that worked in the multiple employer unit within the period? A. That is correct."

The Board found, in reversing the trial examiner, that the Union required non-Union applicants to apply for membership immediately upon their first job referral.

This is not the evidence. The trial examiner found from the evidence that there was no requirement by the Union that a membership application be made by non-Union members upon the first job referral. He found [Tr. p. 13] as follows:

“Nor is there any showing here that this signing was not with the individual employee’s consent and for his individual convenience. Especially is this true in view of the testimony of the union official that he knew of men dispatched to jobs without having paid a ‘dime’ to the Union, although apparently there was also a ‘practice’ to have the employee pay a part of his initiation fee at the time of the referral. That practice may also well have been for the convenience of the man as well as the Union. In the absence of proof that the making of an application for membership and the payment of all or a part of the fee was a condition precedent to the referral to the job, the undersigned would be guessing and conjecturing if he held such an indefinite practice to be violative of the Act. Under the law, the undersigned is prohibited from accepting suspicion and conjecture in the absence of proof. The undersigned, therefore, on this record, must hold that the hiring hall and practice thereunder were legal under the Act.”

Nowhere in the evidence does it appear that the non-members were *required* to sign an application.

The foregoing finding of the trial examiner that the Union did not require an application or a payment from non-members is amply supported by the record. [Tr. pp. 132, 133.] The witness McNeel testified:

“Well, he would be cleared to the job and he would have, as the contract calls for, thirty days to become

a member according to the contract . . . I do know this, that it isn't absolutely necessary to do that (referring to payment). I know that men have been cleared without putting a dime on it. I do know that."

McNeel testified [Tr. pp. 69 and 70]:

"Q. In other words, your out of work list, as I understand it now and correct me if I'm wrong, is headed with your members and then below your members is another group which is headed transfers? A. Not below them, no.

Mr. Sokol: All in one?

The Witness: All, the heading is the same but they are not below because if they can't find a man on this list they go on down and it's all tied in, all printed on the same list.

.

A. . . . there's a difference between the Applicants and Others list and the so-called information list because there is a provision in the National Labor Agreement that the men, called, I believe, a seniority clause, where they must have worked within the employer unit within the last ten years so the Applicants and Others and the information cards are set aside for that reason. They did not qualify for work within the employer unit under the master labor agreement."

The Board, further, found that the Union required non-Union applicants to pay a weekly permit fee. There is no testimony in the record to support this finding. It is true that the Constitution and Bylaws of the International Union refer to such a work permit fee, but there

is no evidence in the record that the respondent Union put work permit fees into effect.

With respect to the alleged discriminatory practice against Holderby, the Board, in reversing the trial examiner, found that Holderby's name had been removed from the "Members" list and put on the "Applicants and Others" list. There is no evidence of record showing that the mere removal of Holderby's name from one heading to another resulted in any discrimination against him. The trial examiner found that Holderby, after he became a member of the Union, worked for numerous contractors for periods of short duration, and in the winter of 1952 became delinquent in his dues and was suspended from membership in January, 1953. [Tr. p. 15.] The trial examiner found: "During this whole period of time, including that while suspended, Holderby was being referred to jobs regularly." [Tr. p. 18.] The evidence shows that at no time was Holderby told that he was not going to be given referrals by the Union. [Tr. p. 117.] No officer of the Union ever informed him that he would be deprived of work because of his name going from one list to another. [Tr. p. 117.] He was referred out to employment without discrimination. [Tr. pp. 18, 19, 21.] He himself conceded that on several occasions when he approached employers in the industry for work he was not hired for the simple reason that there was no work available. [Tr. p. 112.] His own testimony shows that he was employed in other fields during the period and had not made himself avail-

able for work. [Tr. pp. 95, 110.] He had been discharged many times and had been criticized for poor workmanship. [Tr. pp. 112, 120.] He testified [Tr. p. 118]:

“Q. After June of 1954 did you get any referrals out of the Union and go out on jobs? A. Yes, sir.”

Notwithstanding this evidence and contrary to the trial examiner's findings that there was no discrimination practiced against Holderby, the Board held that the removal of Holderby's name from the Contractual Preferred List because he had lost his Union membership was a violation of the Act because it denied him equal access to jobs. [Tr. p. 40.] This was an erroneous finding because Holderby remained, for all practical purposes, on the preferred list.

B. The Board Erred in Failing to Dismiss on the Ground of Lack of Jurisdiction.

As pointed out by the dissenting Board member, the Honorable Abe Murdock, employers alone are forbidden to discriminate against their employees *to encourage or discourage Union membership*. (Sec. 8(a)(3).) Unions, on the other hand, are forbidden under Section 8(b)(2) to cause or attempt to cause an employer to discriminate. Since no employer was joined in the action and since there was no showing that the Union caused or attempted to cause any specific employer to discriminate, the complaint should have been dismissed.

II.

ARGUMENT.

A. There Was No Substantial Evidence to Support the Board in Holding That the Practices of the Union in Dispatch of Employees Was Illegal.

The Board takes the position that the respondent Union gave preference in job referrals to its members. This it was entitled to do under the contract between it and the A. G. C., since the preference went to men who had been employed in the construction industry during the previous ten years. Obviously, all of such employees had to be members in view of the Union security provisions in the Industry, both in the current and prior agreements. Because of the Union security provisions, even under the Taft-Hartley Act, all employees had to become members after thirty days of employment. The trial examiner logically concluded [Tr. p. 14]:

“As the contract required that all employees become members of the Union within thirty days of their employment by A. G. C. contractors, it is clear that only members of Local 12 would have worked for the A. G. C. contractors in the past ten years.”

The Board claims that it was a discriminatory practice on the part of the Union to have two headings on its list of unemployed, that is, one headed “Members,” and the other, “Applicants and Others.” Certainly it was reasonable for the Union to devise this method so as to comply with the agreement, inasmuch as its members have worked for the A. G. C. employers within the prior ten years and were entitled to preference. It appears to be

the only logical way to differentiate between those who are entitled to preference and those who are not. The Board, however, claims that the transfer of the name of Holderby from the "Members" list to the head of the "Applicants and Others" list was discriminatory, but here again obviously, his name was put at the head of the "Applicants and Others" list, so that it would be readily available for dispatch to the job with preference, inasmuch as he had worked in the construction field, but since he had been suspended from membership, technically his name did not come under the "Members" roll. Despite this fact, however, the record is clear that he was dispatched to jobs with preference and without discrimination.

The Board claims that individuals who were not on the "Members" list and who were dispatched from the "Applicants and Others" list were required to apply for membership. Actually, the record does not support the finding that they were *required* to apply. They may have applied, but voluntarily. As the trial examiner said [Tr. pp. 12, 13]:

"There is nothing in the Act which deprives an employee of the right to apply for membership prior to the expiration of that thirty day period if he so desires. The fact that it was the 'practice' to have such an employee sign an application for membership at the time of his first referral is not proof that the signing of such an application for membership was a condition precedent to the securing of the referral."

The Board cannot refer to any evidence in the record that prospective non-member employees were either required or compelled or forced to sign an application be-

fore going to work and as a matter of fact, the signing of an application could well be for the benefit of the employee, since he, therein, set forth information as to his prior work so that he could be properly classified by the Union. [Tr. pp. 114, 145.]

The Board found, further, that non-members who were dispatched to work were required to pay a work permit fee. [Tr. p. 33.] Actually, there is no evidence whatsoever in the record to support a finding that the respondent Union required or compelled prospective non-member employees to pay a work permit fee. It is true that the trial examiner made such a finding, which was not excepted to. The reason that respondent did not except to any of the findings of the trial examiner obviously was that the trial examiner had recommended dismissal of the complaint and had concluded that the Union had not violated the Act in any respect, and necessarily respondent did not want to disturb such recommendations and findings. Whether the trial examiner found such to be the practice or not, the fact remains that there is no testimony or evidence of record showing that the Union did charge a work permit fee. Article XV, Section 3(e) of the International Union's Constitution requires a work permit fee of each hoisting or portable engineer or apprentice, but there is no evidence that such a requirement was put into practice by the respondent Union.

It, therefore, is clear that the findings of the Board that the respondent Union required applicants to apply for membership and imposed a weekly permit fee, are not based upon evidence, and since it appears that the Union properly gave preference to its members who had worked in the Industry during the prior ten years, there was no basis for the Board's finding that the respondent

caused employers to discriminate against non-Union applicants for employment to the advantage of Union members. [Tr. p. 38.]

B. There Was No Substantial Evidence to Support the Board's Holding of Discrimination Against Holderby.

The Board relies, in its reversal of the trial examiner, upon the fact that Holderby's name was removed from the "Members" list to the "Applicants and Others" list. Clearly, if Holderby was not refused dispatch to the job by the Union without discrimination, the mere fact that it removed his name from one list to the other would not of itself be a violation of the Act. There was ample reason for the Union to remove him from the "Members" list, since they no longer considered him a member, but the evidence shows distinctly that despite his removal from one list to the other he was ordered cleared for work. The trial examiner [Tr. pp. 137, 138] noted for the record that the Union had ordered Holderby cleared for work. The trial examiner found that the weight of the evidence did not support any finding that the Union discriminated against Holderby, because he was given every work opportunity. [Tr. pp. 18, 19, 20, 21, 22, 23 and 24.] The trial examiner said:

"In order to prove discriminatory treatment as to Holderby it was incumbent upon the General Counsel to prove that there were jobs available for employees with Holderby's capabilities and, furthermore, that he, Holderby, was not referred to those jobs."

The trial examiner found that there was no evidence to support a finding that Holderby had been denied any jobs for which he was fitted.

But the Board, in reversing the trial examiner did so essentially upon the fact that he was transferred from one list to another, even though this did not result in denial of employment to him on an equal basis with other members.

C. The Board Erred in Failing to Dismiss, in View of the Fact That There Was No Evidence That the Respondent Union Caused or Attempted to Cause Any Employer to Discriminate Against Holderby or Any Other Employee.

Section 8(b)(2) of the Act provides:

“It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of Subsection (a)(3), or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”

The dissenting member of the Board said:

“ . . . Employers alone under Section 8(a)(3) are forbidden to discriminate against their employees to encourage or discourage union membership. Unions, on the other hand, are forbidden under Section 8(b) to (2) to ‘cause or attempt to cause’ such discrimination *by an Employer*. It is therefore completely outside the applicable proscription of this Section of the Act to find, as the majority does, that the Respondent Union discriminated ‘against non-members of Local 12.’ The fact that the Respondent Union may have referred one employee rather than another to prospective employers is not sufficient, in

my opinion, to prove that the Union *caused* a particular employer to engage in an act of discrimination. Indeed, the record in this case contains not the slightest evidence that any employer took any action or was induced or requested by the Union to take any action to the detriment of any employee. In this respect, at least, the *Boilermakers* case upon which the majority relies is entirely inapposite. There the court found that the 'record is clear that because the complainants were delinquent in union dues the *employers* refused to consider them on an equal basis with union men in good standing who were applying for such extra work as was available.' (Italics added.)

"The General Counsel does not contest the legality of the agreement between the Union and the contractors' Association whereby the Union agreed to refer applicants for employment to members of the Association. If, however, this contract is legal there is no act by any employer in this case which is even remotely related to discrimination against any employee. But the majority finds, nevertheless, that the Union caused the members of the Association to engage in acts of discrimination against employees and prospective employees. I am unable to determine from a reading of the majority's decision the basis of their conclusion that the referral practice of the Union, unauthorized under the terms of its contract with the Association constituted discrimination by members of the Association against employee applicants generally and Holderby in particular. If the majority is holding implicitly that the Union was acting as an agent of the Association in discriminating among applicants in violation of Section 8(a)(3), there is, in my opinion, no warrant for such a finding in this case. The only authorization extended to the Union by the Association was to refer applicants for em-

ployment in accordance with the terms of the contract which, as indicated above, is not alleged to be an unlawful agreement. Certainly, there is nothing in the common law rules of agency making members of the Association liable, as principals, for unauthorized acts of the Union, particularly where, as here, those acts are found to be in violation of a federal statute.

“I believe the majority has misread the language of Section 8(b)(2). The Statute clearly establishes that discrimination by an employer is a prerequisite to a finding of unlawful causation under Section 8(b)(2). In the instant case the majority’s decision, in effect, converts discrimination by a Union into discrimination by an employer. In my opinion, this goes beyond the literal language of Section 8(b)(2) and the intent of Congress in its enactment.

“For these reasons I dissent.”

III.

THE APPLICABLE LAW.

In order to uphold a finding that the Union has been guilty of an unfair labor practice, Section 10(c) of the Act requires that the finding be based upon “the preponderance of the testimony,” and Section 10(e) states that the findings of the Board with respect to questions of fact shall be conclusive “if supported by substantial evidence.”

As was said by the Court in *N. L. R. B. v. Sun Ship Building and Dry Dock Company*, 135 F. 2d 15 (C. C. A. 3; 1943):

“It is our duty to accept as conclusive such of the Board’s findings of fact as are supported by evidence. (*National Labor Relations Board v. Waterman Steamship Corporation*, 309 U. S. 206, 208) . . .

the term 'evidence' as used in this connection means 'substantial evidence.' That is, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (*Consolidated Edison v. National Labor Relations Board*, 305 U. S. 197, 229), and affords 'a substantial basis of fact in issue can be reasonably inferred' (*National Labor Relations Board v. Columbian Enameling and Stamping Company*, 306 U. S. 292, 299.)"

But the Court in the *Sun Ship Building* case went on to say that:

"The duty to find the facts does not carry with it the prerogative of raising suspicion to the status of fact or of basing inferences upon mere speculation."

And as was said by the Court in *Appalachian Electric Power Company v. National Labor Relations Board*, 93 F. 2d 985 (C. C. A. 4, 1938), the substantial evidence test

"... is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."

The trial examiner, in holding that the dispatching practices of the Union were not illegal, said that he was prohibited from accepting suspicion and conjecture in the absence of proof. [Tr. p. 13.] The Board bases its order upon conjecture and inferences that are not founded upon proof of any kind. In *N. L. R. B. v. Swinnerton and Walberg Company*, 202 Fed. 511, this Court said:

"Questions of credibility are generally for the trial examiner who has the opportunity to observe the demeanor of the witnesses."

It was the trial examiner who observed the demeanor of the witnesses and weighed the evidence, who concluded that there was no substantial evidence to support the charges.

We do not quarrel with the proposition laid down in the Board's brief that a Union violates the Act where either by written agreement or by practice it causes or attempts to cause an employer to engage in such discrimination. However, none of the cases cited are helpful in this connection because they all relate to discrimination or attempts at discrimination against the employees of specific employers.

The record in this case shows no proof of any attempted discrimination with respect to employees or prospective employees of any specific employer.

The Board (Board's Br. p. 13) states that the Union included in its preferred category for job referrals all members of Local 12 whether or not they had prior employment with A. G. C. members. This is an incorrect statement of the record because there is no showing by the Board that all of the members of Local 12 did not have prior employment with A. G. C. members. It appears that it would be incumbent upon the Board to prove to the contrary, that is, that not all of the members of Local 12 were entitled to the preference.

By the same reasoning, the Board's Brief, page 13, says that Holderby, who qualified for preference, was dropped from the preferred category once his Local 12 membership terminated. This is not the evidence, the Board did not establish this to be a fact, and the contrary was established—that is, that Holderby, although his name was transferred from one heading to another,

retained his preferred status and was dispatched to work. The Board further claims (Board's Br. p. 14) there was a practice of requiring non-Union members to apply for membership immediately upon their first job referral. Certainly, a voluntary act by the applicant for his own benefit is not in violation of the Act. The Act nowhere proscribes the voluntary signing of an application for membership upon referral to work.

It is argued that the position taken by the dissenting member of the Board is vulnerable, even though the Union did not cause or attempt to cause any specific employer to discriminate. The Board has held that Unions, as such, are non-profit organizations and are not engaged in a commercial venture within the contemplation of the Board's jurisdiction. (*Oregon Teamsters*, 113 N. L. R. B. No. 111, 36 L. R. R. M. 1408.)

The Board, in this case, is attempting to fix responsibility for violation of the Act upon an isolated incident involving the transfer of Holderby's name which is magnified out of all proportion to its importance where there was no showing that there was a scheme of discrimination by the Union.

This Honorable Court has said:

"Even if this isolated incident did occur, to predicate a cease and desist order upon it is to magnify the inconsequential to the point where the action becomes an abuse of discretion. See Title 5, U. S. C. A., Section 1009(e)."

N. L. R. B. v. Meatcutters Local, 202 F. 2d 671.

IV.
CONCLUSION.

We urge that enforcement of the Board's order be denied because no unfair labor practices by the Union have been established, since there was no evidence on which the Board could infer that the Union restrained or coerced employees in the exercise of their rights under the Act by compelling them to sign an application for membership before going to work or by compelling them to pay a fee or by discrimination against Holderby or any other person.

Respectfully submitted,

DAVID SOKOL,

Attorney for Respondent.



No. 15,003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL
No. 12, AFL,

Respondent,

Petition for Rehearing of an Order of the National
Labor Relations Board.

DAVID SOKOL,

5225 Wilshire Boulevard,

Los Angeles 36, California,

Attorney for Respondent.

FILED

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No. 15,003
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL
No. 12, AFL,

Respondent,

**Petition for Rehearing of an Order of the National
Labor Relations Board.**

Respondent petitions for rehearing herein and prays that the same, if granted, be heard *en banc*. This is a case of first impression.

The cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 15, 1955. The Court heard argument of respective counsel on July 10, 1956, and has considered the briefs and the transcript of record filed in this cause. On October 9, 1956, the Court, being fully advised in the premises, handed down its decision enforcing, as modified, the Board's Order.

The respondent prays for a rehearing on the grounds that a vital part of the record was not considered by the Court; and that the Court in finding that respondent Union violated Section 8(b)(2) of the Labor-Management Relations Act of 1947, has gone beyond the language of the Act and the intent of Congress.

I.

The Court Erred in Holding That Under the Circumstances Respondent Violated Section 8(b)(2).

In this regard, respondent notes that the Court, in making a determination that Holderby was discriminated against, relied upon a portion of the Trial Examiner's report which in fact holds to the contrary.

This honorable Court found:

“With respect to Holderby, the Examiner found a correlation between his suspension from the union and lack of work referrals, but held that it was incumbent upon the General Counsel to show the availability of employment for which the claimant was qualified and a refusal by Local 12 to refer him thereto, in order to show discriminatory treatment within the meaning of the Act.

“‘The Trial Examiner's intermediate Report stated: “Holderby's uncontradicted testimony is that he was always available for employment and indeed sat around the hall for months looking for jobs. This testimony is all the more impressive when his 1954 record is examined. Thus, for no apparent reason, and two days after the issuance of the complaint therein he is suddenly referred to a job for the first time in 11 months and is thereafter kept at work with the same general degree of frequency as he had been prior to his expulsion from the Union, while his name remains on the same list, *i.e.* the ‘Applicants and Others’ list. Then, when it becomes apparent that he will not drop the charge, but will continue the case, the supply of jobs is shut off just as abruptly as it started. There is no evidence that jobs suddenly became more available in June, that

jobs had not been available all along and the inference is unmistakable that his referrals to jobs was not based upon his location on the list without regard to other factors.” ”

Actually the Trial Examiner did not find that Holderby was available for employment. We cite the entire text of the Trial Examiner's conclusion on this point, commencing on page 21 of the transcript and reading as follows:

“Counsel for the Respondent points out that ‘there is no showing in the testimony that there was any jobs available that Holderby might have filled which he did not obtain because of any failure of the Union to properly refer him out * * *’ General Counsel attempts to answer this contention, originally raised during oral argument at the hearing, by contention that because of Holderby's work record on numerous jobs from July 14, 1952, through June 1953, ‘accordingly, it stands to reason that from the period of July 1953, to June 1954, certainly some jobs must have become available to which he should have been referred but was not.’ General Counsel also sees confirmation of this contention in:

“Holderby's uncontradicted testimony is that he was always available for employment and indeed sat around the hall for months looking for jobs. This testimony is all the more impressive when his 1954 record is examined. Thus, for no apparent reason, and two days after the issuance of the complaint herein he is suddenly referred to a job for the first time in 11 months and is thereafter kept at work with the same general degree of frequency as he had been prior to his expulsion from the Union, while his name remains on the same list, *i.e.*, the ‘Applicants and Others’ list. Then, when it becomes ap-

parent that he will not drop the charge but will continue the case, the supply of jobs is shut off just as abruptly as it was started. There is no evidence that jobs suddenly became more available in June, that jobs had not been available all along and the inference is unmistakable that his referrals to jobs was not based upon his location on the list without regard to other factors.

“This inference is not as ‘unmistakable’ as the General Counsel sees it because Holderby himself testified that, in addition to seeking work futilely from numerous employment agencies, he also sought work from a number of contractors individually during this same period and was told without exception ‘no work’ or ‘not much work right now.’ He was unable to secure employment in the construction industry even though the contractors had the right to request an employee by name. Holderby’s own testimony made it clear that there was little work available in the construction industry around Los Angeles during the period he was supposedly available for work. In view of his employment by two motor companies, his availability for work in the construction industry becomes, at least, questionable. Holderby also acknowledged that he had been discharged by several contractors which might well have restricted the job opportunities for him. Nor does the work record after April 1954 appear to justify Holderby’s claim of availability for he appears to have become quite particular about the referrals he would accept for it is to be noted that some referrals were refused by him as being ‘too far’ or because of a lack of sufficient transportation. The record seems to indicate something less than anxiety for employment on the part of Holderby.”

From the foregoing it can be readily observed that there is insufficient evidence in the record to support the Board's finding of discrimination against Holderby based on the pattern of job referrals since he did not make himself available for employment during the period in question.

II.

The Court Erred in Holding That There Was Evidence of Violation of Section 8(b)(2) by Respondent.

In the original proceedings before the National Labor Relations Board, the dissenting member of the Board pointed out the majority of the Board had misread the language of Section 8(b)(2); that the Statute establishes that discrimination by an employer is a pre-requisite to a finding of unlawful causation under Section 8(b)(2) and that in fact there was no evidence of any kind to show discrimination or attempted discrimination by any employer.

Section 8(b)(2), by its own terms, forbids a union to cause or attempt to cause discrimination by an employer. Such discrimination cannot be read into the act by the mere refusal to dispatch an employee from the hiring hall, but there must be definite proof that the union attempted or caused an employer to discriminate.

We believe that Congress did not intend that there be read into Section 8(b)(2) an inference that by merely refusing to dispatch a man to a job the union was causing an employer to discriminate. In this regard we find that the dissent in this Court supports this view. We quote from the dissenting opinion by Mr. Justice Hastie:

“I think the union's action with reference to Holderby did not constitute a violation of clause (2) of

Section 8(b). The issue under that clause is whether the union caused or attempted to cause any employer to discriminate against Holderby in violation of the Act. In resolving that issue it must be determined whether the union caused or attempted to cause an 'employer to engage in conduct which, if committed would violate Section 8(a)(3).

“That subsection makes it an unfair labor practice for an employer “(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .” (29 U. S. C. Sec. 158(a)(3).)

“(Radio Officers’ Union v. National Labor Relations Board, 1954, 347 U. S. 17, 53.)

“In this case no employer was told or even given reason to believe that Holderby or anyone else was being treated improperly in the matter of job referral. No one brought to any employer’s attention any charge that the union was abusing the lawful referral arrangement to which various employers had subscribed. At most the union was accomplishing an effective discrimination against Holderby without causing or attempting to cause any employer to act improperly in any way.

“In this all important respect the present case differs from the numerous adjudicated cases in which the board and the courts have found violations of Section 8(b)(2). Those cases characteristically reveal either aggressive wrongdoing by the employer himself or his acquiescence and cooperation in making misconduct on the part of the union injurious to some employee.

“See *e.g.* National Labor Relations Board v. Local 803, International Brotherhood of Boiler-

makers, AFL, 3d Cir. 1955, 218 F. 2d 299 (On union demand the employer fired and refused to hire men not in good standing in the union); National Labor Relations Board v. International Union of Operating Engineers Local 101, AFL, 8th Cir. 1954, 216 F. 2d 161 (Employees discharged in accordance with union seniority rules though employer's rules provided otherwise); National Labor Relations Board v. Philadelphia Iron Works, 3d Cir. 1954, 211 F. 2d 937 (Union caused employer to withdraw job offer); National Labor Relations Board v. George Auchter Co., 5th Cir. 1954, 209 F. 2d 273 (Employer refused to employ applicant because of union's refusal to issue referral); National Labor Relations Board v. Bell Aircraft Corp., 2d Cir. 1953, 206 F. 2d 235 (Employee denied promotion because union charges pending against him.)'

"National Labor Relations Board v. International Longshoremen's and Warehousemen's Union, 9th Cir. 1954, 210 F. 2d 581, deserves special mention because it is a very recent decision of this court. But there too the employer was chargeable with knowledge of and responsibility for the misconduct of certain wrongdoing dispatchers, because those dispatchers were employees of the employer as well as the union and were subject to removal by an employer-union committee.

"In the present case the board has made a passing, but in my view unsuccessful, effort to charge employer complicity in or responsibility for the union's alleged wrongdoing. In a footnote the board refers to the employer's duty 'to insist that the union fulfill its contractual obligation of maintaining nondiscriminatory hiring lists'. I think it would be unfair and ir-

rational to impose such a duty unless and until the employer is at least put on notice that the union is improperly discriminating against someone in the making of referrals. And, I know of nothing in the Act or its history that suggests legislative intention to burden the employer with ferreting out union misconduct on penalty of being charged with complicity in that which he has not discovered.

“The foregoing analysis leads me to agree with the member of the board who dissented in this case that the record does not establish a violation of Section 8(b)(2).”

As the Honorable Abe Murdock said in his dissent in the proceedings before the Board:

“ . . . there is no act by any employer in the case which is even remotely related to discrimination against any employee. . . . In the instant case the majority’s decision, in effect, converts discrimination by a union into discrimination by an employer. In my opinion, this goes beyond the literal language of Section 8(b)(2) and the intent of Congress in its enactment.”

General Counsel for the Board admits that this question has not been decided before. We respectfully submit that the majority’s opinion, in this case, extends the Taft-Hartley Act beyond what Congress intended and, therefore, that a rehearing should be granted.

Respectfully submitted,

DAVID SOKOL,

Attorney for Respondent.

Certificate of Counsel.

I, DAVID SOKOL, counsel for Respondent in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

DAVID SOKOL,
Attorney for Respondent.



No. 15004

United States
Court of Appeals
for the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

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No. 15004

**United States
Court of Appeals**
for the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD.,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
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Northern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee.



In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

In Admiralty No. 15848

WESTERN CANADA STEAMSHIP COMPANY,
LIMITED, a Corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL IN PERSONAM

TO THE HONORABLE JUDGES OF THE
DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVI-
SION

The libel of Western Canada Steamship Company,
Limited, a corporation, as libelant, against respond-
ent, United States of America, in a cause of con-
tract civil and maritime, alleges as follows:

I.

Libelant, Western Canada Steamship Company,
Limited, is now and at all times herein mentioned
was a corporation duly organized and existing under
and by virtue of the laws of the Dominion of
Canada.

II.

Respondent, United States of America, is now and
at all times herein mentioned was a corporation

sovereign which by the act of Congress approved March 3, 1925 (43 Stat. 1112 et seq.), Title 46 U. S. C. § 781 et seq., has consented to be sued in this Honorable Court on the cause of action herein stated, and except as herein otherwise alleged, was as to all matters and things herein alleged, acting by and through the Military Sea Transportation Service represented by its Contracting Officer. The Dominion of Canada under similar circumstances, allows nationals of the United States to sue in its Courts.

III.

As of July 26, 1950, libelant as owner of the Canadian Flag Vessel Lake Sicamous, Official No. 175596, herein called the "Vessel," entered into a written time charter of the Vessel to respondent under Contract No. MST-197, herein called the "Charter," a duplicate original of which is in the possession of respondent, for a specified time, to wit, for a period of about 120 days from the time of delivery of the Vessel or to the termination of the voyage current at termination date, at a charter hire of \$1,125.00 per diem.

IV.

The Vessel was delivered by libelant to respondent at Seattle, Washington on August 4, 1950, at noon, Pacific Daylight Standard Time and was redelivered by respondent to libelant at Seattle, Washington on February 12, 1951, at midnight, Pacific Standard Time, the elapsed time from delivery to redelivery, together with 1 day 17 hours allowed for comple-

tion of repairs following redelivery, was 194 days 6 hours. While in the service of the respondent the Vessel was employed exclusively in the transportation for respondent of munitions of war, owned by respondent, from war bases in the United States to war bases adjacent to Korea and was as a result employed as a public vessel of the United States within the meaning of the Act of Congress approved March 3, 1925, referred to in Article II hereof.

V.

Following the execution of the charter the market value of hire of the Vessel for charter purposes under similar conditions to those contained in the charter increased and during the entire period of the second voyage hereinafter mentioned, and for a period substantially in excess of three days following the date of redelivery of the Vessel, such market value of the hire of the Vessel was not less than the rate of \$55,200.00 per 30 day month, or \$1,840.00 per day.

VI.

The charter provides that the Vessel shall be employed as directed by the respondent as charterer, and following the delivery of the Vessel and under instructions of respondent, the Vessel made two voyages with munitions of war belonging to respondent and for use in Korea. The first voyage was from Mukilteo, Washington, to Okinawa, where the cargo was discharged and the Vessel returned to and arrived at Seattle, Washington,

on October 13, 1950. The second voyage was from Bangor, Washington to Moji and Kure, Japan, where the cargo was discharged and the Vessel returned to and arrived at Seattle, Washington on February 12, 1951, where the Vessel was redelivered as hereinabove alleged.

VII.

Respondent was obligated as an implied term of the charter and as a matter of law, to so direct the employment of the Vessel as to permit the redelivery of the Vessel within the period of the charter, to wit, about 120 days from the time of delivery of the Vessel, unless prevented from so doing by causes specified in the charter. The failure of respondent to redeliver the Vessel within the period of the charter was due solely to the failure of the respondent, following the first voyage, to direct the employment of the Vessel on a second voyage with normal and available dispatch in proceeding to and arriving at port of loading, port or ports of discharge, and port of redelivery within the charter period, and in failing to load and discharge the Vessel with normal and available dispatch. In failing so to do respondent caused the second voyage of the Vessel to be unnecessarily prolonged beyond the period of the charter, which such prolongation was due solely either to the design, fault or neglect of respondent and was in no part due to the design, fault or neglect of libellant or of the Vessel or to any causes for which respondent is relieved by the provisions of the charter.

VIII.

Following the redelivery of the vessel libelant submitted its claim to the Contracting Officer for hire unpaid at the charter rate, which has been paid, and for additional hire based upon the difference between the rate of hire specified in the charter and the market value of the hire of the Vessel for the period by which the redelivery of the Vessel was prolonged beyond the period of the charter. The Contracting Officer under date of July 2, 1951, refused to entertain the claim for such additional hire, advising libelant that the settlement of such a claim was not within the authority of the Military Sea Transportation Service or its Contracting Officer, and referred libelant to the Comptroller General of the United States. Libelant thereupon presented its claim for such additional hire to the Comptroller General of the United States and the same was by him rejected on November 7, 1952.

IX.

By reason of the premises respondent is indebted to libelant for additional hire, to wit, the difference between the rate of hire specified in the charter and the market value of the hire of the Vessel for the period by which the redelivery of the Vessel was prolonged beyond the 120-day period of the charter, to wit, 74 days 6 hours, making a total sum of \$53,088.75, or alternatively, for the amount of such difference for so much of said period of prolongation as the Court may find to be justly due to libelant, with interest thereon at six per cent per annum

from February 12, 1951, no part of which said sum, or interest, has been paid to libelant, although duly demanded.

X.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore libelant prays:

1. That process in due form of law according to the Rules and Practices of Admiralty and Maritime Jurisdiction issue against respondent requiring it to appear and answer the foregoing libel.

2. That this Court shall decree the payment by respondent to libelant of the sum of \$53,088.75 or such lesser sum as the Court may find to be justly due to libelant, together with interest and costs to be taxed.

3. That libelant shall have such other, additional or further relief as may seem to the Court lawful, just and proper.

BOGLE, BOGLE & GATES,
EDWARD G. DOBRIN,

/s/ CLAUDE WAKEFIELD,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed February 9, 1953.

[Title of District Court and Cause.]

ANSWER

Comes now the respondent, United States of America, and for answer to the Libel in Personam of the Western Canada Steamship Company, Ltd., herein, admits, denies and alleges as follows:

I.

Respondent admits the allegations of Article I.

II.

Respondent admits the allegations of Article II.

III.

Respondent admits the allegations of Article III.

IV.

Respondent admits the allegations of Article IV.

V.

Respondent denies each and every allegation contained in Article V.

VI.

Respondent admits the allegations of Article VI.

VII.

Respondent denies each and every allegation contained in Article VII.

VIII.

Respondent admits the allegations of Article VIII.

IX.

Respondent denies each and every allegation contained in Article IX.

X.

Respondent denies each and every allegation contained in Article X.

And for an Affirmative Defense, this respondent alleges:

That the said vessel was still engaged in the second voyage when the 120-day period elapsed, and was immediately redelivered upon the termination of the second voyage which was the "voyage current at termination date."

/s/ J. CHARLES DENNIS,
United States Attorney.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1953.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS AND
OF GENUINENESS OF DOCUMENTS

Comes now libelant herein, by and through Bogle, Bogle & Gates, its proctors, pursuant to Rule 32B of the Supreme Court Rules of Practice in Admiralty and Maritime cases, and requests respondent herein to admit the truth of the following relevant matters of fact:

1. That the copy of the "Transcript of Register for Transmission to Registrar-General of Shipping and Seamen" attached hereto marked Exhibit 1 is a true and correct copy thereof, and that the facts stated therein are true and correct.

2. That the copy of MST-197 attached hereto marked Exhibit 2 is a true and correct copy thereof, and that MST-197 is the charter party sued upon herein.

3. That MST-197, and all amendments, modifications and addenda thereto, were prepared by respondent on its own forms and submitted to libellant for signature.

4. That by letter dated November 21, 1950, respondent, acting through R. A. Carl, L.C.D.R., S.C., U.S.N., Contracting Officer, notified libellant, through its agent, J. H. Winchester & Company, Inc., as follows:

"This will confirm notice of cancellation of the SS. Lake Sicamous time charter contract MST-197 given your broker, J. H. Winchester & Company, Inc., by telephone 1135 hours, 13 November, 1950.

"The SS. Lake Sicamous will be redelivered to owner upon termination of current voyage in Seattle, Washington.

"You are advised that all action incident to the redelivery of the vessel at Seattle should be coordinated with the Deputy Commander, Military Sea Transportation Service, North Pacific, Pier 37, Se-

attle 4, Washington, who, by copy of this letter is being requested to effect redelivery of the SS. Lake Sicamous.”

5. That on November 13, 1950, the SS. Lake Sicamous was bound on a voyage from Bangor, Washington, to Yokohama, Japan, and return, pursuant to the instructions of respondent under and by virtue of MST-197.

6. That the “Voyage current at termination date,” as said phrase is used in Article 5(a) of MST-197, was a voyage from Bangor, Washington, to Yokohama, Japan, and return.

7. That on or about November 30, 1950, respondent caused said vessel to deviate to Moji, Japan, for discharge of cargo, instead of permitting the said vessel to proceed to Yokohama, Japan, the port of discharge originally designated by respondent for said voyage.

8. That thereafter, on or about December 12, 1950, respondent caused said vessel again to deviate to Kure, Japan, for further discharge of cargo.

9. That thereafter, on or about January 19, 1951, respondent caused said vessel again to deviate to Kobe, Japan, for further discharge of cargo and/or refueling.

10. That by letter dated July 2, 1951, respondent, acting through R. A. Carl, L.C.D.R., S.C., U.S.N., Contracting Officer, advised libelant as follows:

“Reference is made to your letter of May 3, 1951, in which you urged reconsideration of your claim for additional charter hire in the amount of \$40,918.65 representing damages which you feel are owed to your company by the government, presumably on the theory that the charter was breached by the government.

“As you have been previously advised, Military Sea Transportation Service is of the opinion that you have been compensated at the agreed rate of hire for the period during which the government has had the use of your vessel in accordance with the terms of the charter party. However, since you apparently feel that you are entitled to \$40,918.65 as additional charter hire resulting from a breach of the charter, you are advised that the settling of such a claim for unliquidated damages arising out of breach of contract is not within the authority of Military Sea Transportation Service, but must be considered by the Comptroller General of the United States. In the event you decide to submit a claim for unliquidated damages to that officer, it should be addressed to the Comptroller General of the United States, General Accounting Office, Washington, D. C.”

11. That by letter dated November 7, 1952, respondent, acting through Lindsay C. Warren, Comptroller General of the United States, by W. J. McCarthy, advised libelant as follows:

“Your claim for \$40,918.65 representing the amount alleged to be due for unliquidated damages arising out of an alleged breach of contract because

of unnecessary delay in redelivery of SS Lake Sicamous by the Department of the Navy in connection with a charter hire under Contract No. MST-197 dated July 26, 1950, has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.

“The records disclosed that the subject contract provided for the charter hire of the vessel for approximately 120 days or for a period terminating with the voyage current at the end of the 120-day period. When the first voyage was completed only 65 days of the estimated charter period had been used. When voyage No. 2 was undertaken there remained 49 days of the 120 charter period. The record also discloses that you made no protest at that time concerning the matter even though you knew that under normal conditions the voyage would extend the time of use beyond the 120-day period: that Voyage No. 2 in fact took about 120 days or about 23 days longer than what might be construed as reasonable, although this prolonged period could not have been anticipated. However, the prolongation was caused by War conditions and exigencies of the War which the government could not anticipate when the vessel was dispatched on Voyage No. 2.

“Article 29 of the Contract Provisions provided a method for the increasing or decreasing charter hire within the period of the contract, which consisted of filing a clearance and the submission of any supporting data; that any disagreement on a

demand for a revised rate of hire that was deemed to be a disagreement as to a question of fact, could have been disposed of in accordance with Article 32 of the charter.

“Accordingly, the claim for unliquidated damages arising out of an alleged breach of contract, must be denied, as it is well settled that no adjustment nor payment from appropriated funds may be made in the absence of a specific provision therefor.

“I therefore certify that no balance is found due you from the United States.”

12. That the United States was engaged in a police action in Korea on July 26, 1950.

13. That the United States was engaged in the same police action in Korea on August 4, 1950.

14. That the United States was engaged in the same police action in Korea on October 14, 1950.

15. That the United States was engaged in the same police action in Korea on November 13, 1950.

16. That the United States was engaged in the same police action in Korea on November 21, 1950.

17. That the United States was engaged in the same police action in Korea on November 30, 1950.

18. That the United States was engaged in the same police action in Korea on December 12, 1950.

19. That the United States was engaged in the same police action in Korea on January 19, 1950.

20. That on none of the aforementioned dates was the United States engaged in a police action or War in Japan.

Each of the foregoing matters of which an admission is requested shall be deemed admitted unless within fifteen days after service hereof respondent serves upon libelant a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why respondent cannot truthfully either admit or deny those matters.

Dated at Seattle, Washington, February 15, 1955.

BOGLE, BOGLE & GATES,
Proctors for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 15, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL REQUEST FOR ADMIS-
SION OF FACTS AND OF GENUINENESS
OF DOCUMENTS

Comes now libelant herein, by and through Bogle, Bogle & Gates, its proctors, pursuant to Rule 32B of the Supreme Court Rules of Practice in admiralty and maritime cases, and requests respondent herein to admit the truth of the following relevant matters of fact:

I.

That MST 197, when negotiated in July, 1950, contemplated two round voyages from a port or

ports on the West Coast of the United States to the Far East.

II.

That at said time the representatives of libelant and respondent who negotiated MST 197 assumed that said two round voyages would take approximately 120 days.

III.

That on or about January 19, 1951, libelant, by and through its agent, J. H. Winchester & Co., Inc., advised respondent as follows by letter dated January 19, 1951:

“We quote letter received from Western Canada Steamship Company, Limited, Owners of the above vessel under date of January 17 which is self-explanatory:

“ ‘We have to advise you that, as the above-named vessel is being retained on charter for about six months by the MSTs, we desire you to give them notice that it is our intention to claim an increase in the per diem hire figure of \$1,125.00 for the period in excess of 120 days due to the higher Time Charter rates paid subsequent to the expiration of the 120-day charter period, the increase to be agreed upon at a later date.’ ”

Each of the foregoing matters of which an admission is requested shall be deemed admitted unless within ten (10) days after service hereof respondent serves upon libelant a sworn statement either denying specifically the matters of which an admis-

sion is requested or setting forth in detail the reasons why respondent cannot truthfully either admit or deny those matters.

Dated at Seattle, Washington, February 25, 1955.

BOGLE, BOGLE & GATES,
Proctors for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1955.

[Title of District Court and Cause.]

RESPONDENT'S ANSWER TO LIBELANT'S
REQUEST FOR ADMISSION OF FACTS
AND GENUINENESS OF DOCUMENTS

Respondent United States of America answers libelant's request for admission of facts and genuineness of documents served on respondent February 15, 1955, as follows:

1. Respondent admits Statement No. 1.
2. Answering Statement No. 2, respondent states that the copy of MST-197 attached is substantially a true copy and that the original will be produced at time of trial.
3. Respondent admits Statement No. 3.
4. Respondent admits Statement No. 4.
5. Respondent denies Statement No. 5, except that respondent admits that on November 13, 1950,

the SS Lake Sicamous was bound on a voyage from Banger, Washington, to a port or ports in the Far East and return, under the terms and conditions of Time Charter Party MST-197. See answers to Statements 7, 8 and 9 *infra*.

6. Respondent denies Statement No. 6.

7. Respondent denies Statement No. 7 and in that connection states that the Time Charter Party MST-197 provides, in the War Risk addendum thereto, in part as follows:

“5. Liberties.—a. The Contractor, Master and Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the Government of any nation or department thereof or any person acting or purporting to act with the authority of such Government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the Vessel, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. The Vessel may carry contraband, explosives, munitions, war-like stores, hazardous cargo, and may sail armed or unarmed and with or without convoy.”

8. Respondent denies Statement No. 8 and in that connection refers to and makes a part hereof as though fully set forth herein respondent's answer to Statement No. 7.

9. Respondent denies Statement No. 9 and in that connection refers to and makes a part hereof as though fully set forth herein respondent's answer to Statement No. 7.

10. Respondent denies Statement No. 10, except that respondent admits that a letter was written to libellant dated July 2, 1951, signed by R. A. Carl, LCDR, SC, USN, Contracting Officer, which letter read as follows:

“Reference is made to your letter of May 3, 1951, in which you urged reconsideration of your claim for additional charter hire in the amount of \$40,918.65 representing damages which you feel are owed to your company by the government.

“As you have been previously advised, Military Sea Transportation Service is of the opinion that you have been compensated at the agreed rate of hire for the period during which the government has had the use of your vessel in accordance with the terms of the charter party. However, since you apparently feel that you are entitled to \$40,918.65 as additional charter hire resulting from a breach of the charter, you are advised that the settling of such a claim for unliquidated damages arising out of breach of contract is not within the authority of Military Sea Transportation Service, but must

be considered by the Comptroller General of the United States. In the event you decide to submit a claim for unliquidated damages to that officer, it should be addressed to the Comptroller General of the United States, General Accounting Office, Washington, D. C.”

11. Respondent denies Statement No. 11, except that respondent admits that a letter was written to libelant dated November 7, 1952, by Lindsey C. Warren, Comptroller General of the United States, by W. J. McCarthy, which reads as follows:

“Your claim for \$40,918.65 representing the amount alleged to be due for unliquidated damages arising out of an alleged breach of contract because of unnecessary delay in redelivery of SS Lake Sicamous by the Department of the Navy in connection with a charter hire under Contract No. MST-197 dated July 26, 1950, has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.

“The records disclosed that the subject contract provided for the charter hire of the vessel for approximately 120 days or for a period terminating with the voyage current at the end of the 120-day period. When the first voyage was completed only 65 days of the estimated charter period had been used. When voyage No. 2 was undertaken there remained 49 days of the 120-day charter period. The record also discloses that you made no protest at that time concerning the matter even though you

knew that under normal conditions the voyage would extend the time of use beyond the 120-day period; that Voyage No. 2 in fact took about 121 days or about 23 days longer than [sic] what might be construed as reasonable, although this prolonged period could not have been anticipated. However, the prolongation was caused by [sic] conditions and exigencies of the War which the government could not anticipate when the vessel was dispatched on Voyage No. 2.

"Article 29 of the Contract Provision provided a method for the increasing or decreasing charter hire within the period of the contract, which consisted of filing a clearance and the submission of any supporting data; that any disagreement on a demand for a revised rate of hire that was deemed to be a disagreement as to a question of fact, could have been disposed of in accordance with Article 32 of the charter.

"Accordingly, the claim for unliquidated damages arising out of an alleged breach of contract, must be denied, as it is well settled that no adjustment nor payment from appropriated funds may be made in the absence of a specific provision therefor.

"I therefore certify that no balance is found due you from the United States."

12. Respondent denies Statement No. 12 and states that respondent was engaged on July 26, 1950, in war or warlike operations in Korea, Japan and other places in the Far East.

13. Respondent denies Statement No. 13 and states that respondent was engaged on August 4, 1950, in war or warlike operations in Korea, Japan and other places in the Far East.

14. Respondent denies Statement No. 14 and states that respondent was engaged on October 14, 1950, in war or warlike operations in Korea, Japan and other places in the Far East.

15. Respondent denies Statement No. 15 and states that respondent was engaged on November 13, 1950, in war or warlike operations in Korea, Japan and other places in the Far East.

16. Respondent denies Statement No. 16 and states that respondent was engaged on November 21, 1950, in war or warlike operations in Korea, Japan and other places in the Far East.

17. Respondent denies Statement No. 17 and states that respondent was engaged on November 30, 1950, in war or warlike operations in Korea, Japan and other places in the Far East.

18. Respondent denies Statement No. 18 and states that respondent was engaged on December 12, 1950, in war or warlike operations in Korea, Japan and other places in the Far East.

19. Respondent denies Statement No. 19.

20. Respondent denies Statement No. 20.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ FRANK N. CUSHMAN,

Asst. United States Attorney;

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney General, Proctors
for Respondent.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

RESPONDENT'S ANSWER TO LIBELANT'S
SUPPLEMENTAL REQUEST FOR AD-
MISSION OF FACTS AND GENUINENESS
OF DOCUMENTS

Respondent United States of America, objecting to the propriety of libelant's addressing more than one request for admission of facts and genuineness of documents to respondent under the Court's rules, answers libelant's supplemental request for admission of facts and genuineness of documents served on respondent February 26, 1955, as follows:

I.

Answering unto Statement No. I respondent states that MST-197, when negotiated in July, 1950, contemplated the delivery of munitions of war by the SS Lake Sicamous to the armed forces of the

United States and allied nations in the theatre of war during the existing Korean War, at such ports and at such times as directed by the Allied officials in charge and that upon the expiration of the first voyage, with knowledge of both parties to the charter of conditions existing in the theatre of war, a second voyage was made with consent of all concerned. Two voyages from a port or ports on the West Coast of the United States to the Far East, under such circumstances, were contemplated by the parties.

II.

Answering Statement No. II, respondent refers to and incorporates herein its answer to Statement No. I and the provision of the Charter Party which provides:

“Article 5. Period of the charter.

“(a) This charter shall be for a period of about 120 days from the time of delivery of the vessel or to the termination of the voyage current at termination date.”

Except as herein admitted the Statement No. II is denied.

III.

Respondent admits Statement No. III.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ FRANK N. CUSHMAN,
Asst. United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General, Proctors
for Respondent.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

To: Western Canada Steamship Co., Ltd., Libelant
above named, and to Bogle, Bogle & Gates, its
proctors:

Please take notice that respondent hereby requests libelant pursuant to Rule 32-B of the Supreme Court Admiralty Rules to admit within 10 days after service of this request the following facts:

I.

Libelant and respondent in entering into Charter Party MST-197, contemplated the carriage under its terms of munitions of war into and within the theater of war of the Korean War or hostilities in which the United States was engaged at the time the said charter party was entered into.

II.

The United States Naval Ordnance Dock at Bangor, Washington, is a naval or military facility

of the United States used for loading and discharging cargoes of ammunition and is operated exclusively by the United States as a part of its military operations and not as a commercial facility.

III.

During the period from December 6, 1950, to December 13, 1950, the Port of Moji, Japan, was an advance war base under the military control of the United States or its Allies and used for logistic support of armed forces of the United States and Allied nations engaged in the Korean War.

IV.

During the period from December 13, 1950, to January 19, 1951, the Port of Kure, Japan, was an advance war base under the military control of the United States or its Allies and used for logistic support of armed forces of the United States and Allied nations engaged in the Korean War.

V.

During the period between December 6, 1950, and January 21, 1951, the Ports of Moji, Kure and Kobe in Japan were within the area subject to the military control of the Supreme Commander, Allied Powers.

VI.

Libelant did not at any time prior to February 13, 1951, deliver to respondent any written demand that the parties negotiate to revise the rate of hire under Charter Party MST-197.

VII.

Libelant did not at any time prior to February 13, 1951, deliver to respondent any new estimate and break-down of the per diem cost and the rate of hire under Charter Party MST-197.

VIII.

Libelant did not at any time prior to February 13, 1951, deliver to respondent any explanation of the differences between the original estimate and the new estimate referred to in Statement No. VII above.

IX.

Libelant did not at any time prior to February 13, 1951, deliver to respondent such relevant operating data, cost records, overhead absorption reports and accounting statements as might be of assistance in determining the accuracy and reliability of the new estimate referred to in Statement No. VII above.

X.

Libelant did not at any time prior to February 13, 1951, deliver to respondent any statement of the experienced costs of operation under Charter Party MST-197.

XI.

Libelant has not at any time mailed or otherwise furnished to the Contracting Officer under Charter Party MST-197 any written appeal addressed to the Secretary of the Navy regarding the rate of hire under the said charter party or any other dispute of fact under the said charter party.

XII.

The SS Lake Sicamous is a Canadian-type Liberty Ship.

XIII.

The SS Lake Winnipeg and the SS Lake Pennask are Canadian-type Liberty Ships.

XIV.

On or about November 10, 1950, the SS Lake Winnipeg was chartered by libelant to the Canadian Government for allocation to Military Sea Transportation Service, at the rate of \$1,225 Canadian (\$1,177.91 U.S.) per day.

XV.

On or about December 6, 1950, the SS Lake Pennask was chartered by libelant to the Canadian Government for allocation to Military Sea Transportation Service at the rate of \$1,225 Canadian (\$1,168.92 U.S.) per day.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ FRANK N. CUSHMAN,
Asst. United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General, Proctors
for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed March 10, 1955.

[Title of District Court and Cause.]

LIBELANT'S ANSWER TO RESPONDENT'S
REQUEST FOR ADMISSION OF FACTS
AND GENUINENESS OF DOCUMENTS

Libelant, Western Canada Steamship Company, Limited, answers respondent's request for admission of facts and genuineness of documents served on libelant March 9, 1955, as follows:

1. With respect to statement No. I, libelant denies the same.

2. With respect to statement No. II, libelant cannot truthfully either admit or deny said statement for the reason that respondent has the exclusive knowledge of the truth or falsity thereof, and libelant has no knowledge or means of knowledge concerning the truth or falsity thereof.

3. With respect to statement No. III, libelant cannot truthfully either admit or deny said statement for the reason that respondent has the exclusive knowledge of the truth or falsity thereof, and libelant has no knowledge or means of knowledge concerning the truth or falsity thereof.

4. With respect to statement No. IV, libelant cannot truthfully either admit or deny said statement for the reason that respondent has the exclusive knowledge of the truth or falsity thereof, and libelant has no knowledge or means of knowledge concerning the truth or falsity thereof.

5. With respect to statement No. V, libelant cannot truthfully either admit or deny said statement for the reason that respondent has the exclusive knowledge of the truth or falsity thereof, and libelant has no knowledge or means of knowledge concerning the truth or falsity thereof.

6. With respect to statement No. VI, libelant states that the matters of fact set forth therein are not relevant to any issue in this case, but nevertheless denies the truth thereof.

7. With respect to statement No. VII, libelant states that the matters of fact set forth therein are not relevant to any issue in this case, but nevertheless admits the truth thereof.

8. With respect to statement No. VIII, libelant states that the matters of fact set forth therein are not relevant to any issue in this case, but nevertheless admits the truth thereof.

9. With respect to statement No. IX, libelant states that the matters of fact set forth therein are not relevant to any issue in this case, but nevertheless admits the truth thereof.

10. With respect to statement No. X, libelant states that the matters of fact set forth therein are not relevant to any issue in this case, but nevertheless admits the truth thereof.

11. With respect to statement No. XI, libelant states that the matters of fact set forth therein are not relevant to any issue in this case, but nevertheless admits the truth thereof.

12. With respect to statement No. XII, libelant denies the same, but admits that the SS Lake Sicamous is a Canadian Victory Ship substantially similar in design, dimensions and capacity to the so-called United States Liberty Ship.

13. With respect to statement No. XIII, libelant denies the same, but admits that the SS Lake Winnipeg and SS Lake Pennask are Canadian Victory Ships substantially similar in design, dimensions and capacity to the so-called United States Liberty Ship.

14. With respect to statement No. XIV, libelant denies the same.

15. With respect to statement No. XV, libelant denies the same.

WESTERN CANADA STEAM-
SHIP COMPANY, LTD.,

By /s/ C. CALVERT KNUDSEN, of
BOGLE, BOGLE & GATES,
Proctors for Libelant.

Receipt of copy acknowledged.

Duly verified.

[Endorsed]: Filed March 18, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL REQUEST FOR ADMIS-
SION OF FACTS AND GENUINENESS OF
DOCUMENTS

To: Western Canada Steamship Co., Ltd., libelant
above named, and to Bogle, Bogle & Gates, its
proctors:

Please take notice that respondent hereby re-
quests libelant, pursuant to Rule 32-B of the Su-
preme Court Admiralty Rules, to admit within ten
days after service of this request, the following
facts:

I.

By charter party dated October 13, 1950, libel-
ant chartered the SS Lake Winnipeg to His Majesty
the King in right of Canada at the rate of \$1,225.00
Canadian per day.

II.

By charter party dated October 13, 1950, libelant
chartered the SS Lake Pennask to His Majesty the
King in right of Canada at the rate of \$1,225.00
Canadian per day.

III.

Both the said charter parties by which the SS
Lake Winnipeg and the SS Lake Pennask were so
chartered contained the following article:

“Article 41. Employment in the Service of the
United Nations.

“It is understood that His Majesty proposes to
make the vessel available to the United Nations for

operational management by the Government of the United States of America acting through Military Sea Transportation Service of the United States Navy or other appropriate agency or service in the trans-Pacific carriage of cargo and accordingly the Owner agrees (a) that wherever herein any right, power or authority is vested in or possessed by the Minister the same shall in each and every case be deemed to be vested in, had and possessed by any person or persons authorized either generally or specifically for such purpose or purposes by the Government of the United States of America (for greater particularity but without derogating from the generality of the foregoing any M.S.T.S. Contracting Officer shall be deemed to have and possess every such right, power and authority) and; (b) that wherever herein any duty, function or responsibility is imposed or conferred upon the Minister the same, if done, performed or discharged by any person or persons authorized either generally or specifically by the Government of the United States of America (e.g., a M.S.T.S. Contracting Officer as aforesaid) shall be deemed to have been done, performed and discharged as fully and effectually under this Charter Party as if done, performed or discharged by the Minister or his representative. Provided always that nothing in this Article shall prevent, preclude or prohibit the Minister either personally or through any officer or servant in the service of His Majesty from exercising his rights or discharging his obligations under this Charter

Party, in which case any act or thing done or any orders and instructions given shall be paramount, nor shall anything herein prevent, prohibit or preclude the Owner from appealing to the Minister in respect of any matter or thing done or omitted to be done by any person other than the Minister. If in the opinion of the Owner or of the Master any instructions or the exercise of any power or function would result in the employment of the vessel for any purpose substantially different or for a period of time greater than that contemplated by this contract the Owner shall forthwith notify the Canadian Maritime Commission thereof by letter or telegraph, providing full particulars of the incident, but in the meantime shall proceed to carry out such instructions unless and until the same have been countermanded by the Minister."

IV.

The SS Lake Winnipeg was delivered under the said charter party to Military Sea Transportation Service at Seattle, Washington, November 10, 1950.

V.

The SS Lake Pennask was delivered under the said charter party to Military Sea Transportation Service at Seattle, Washington, December 6, 1950.

VI.

On October 13, 1950, the exchange rate between United States dollars and Canadian dollars in the

United States stood at or about .9475 United States dollars per Canadian dollar.

CHARLES P. MORIARTY,

United States Attorney;

/s/ FRANK N. CUSHMAN,

Asst. United States Attorney;

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney General, Proctors
for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

LIBELANT'S ANSWER TO RESPONDENT'S
SUPPLEMENTAL REQUEST FOR AD-
MISSION OF FACTS AND GENUINENESS
OF DOCUMENTS

Libelant, Western Canada Steamship Company, Limited, answers Respondent's Supplemental Request for Admission of Facts and Genuineness of Documents, served on libelant April 11, 1955, as follows:

I.

With respect to statement No. I, libelant admits the same.

II.

With respect to statement No. II, libelant admits the same.

III.

With respect to statement No. III, libelant admits the same.

IV.

With respect to statement No. IV, libelant denies the same, but admits that the SS Lake Winnipeg was delivered under the said charter party to His Majesty the King in right of Canada at Seattle, Washington, November 10, 1950, by delivering the same to an M.S.T.S. Contracting Officer at said time and place.

V.

With respect to statement No. V, libelant denies the same but admits that the SS Lake Pennask was delivered under the said charter party to His Majesty the King in right of Canada at Seattle, Washington, December 7, 1950, by delivering the same to an M.S.T.S. Contracting Officer at said time and place.

VI.

With respect to statement No. VI, libelant admits the same.

BOGLE, BOGLE & GATES,

By /s/ C. CALVERT KNUDSEN,

Proctors for Libelant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

INTERROGATORIES TO RESPONDENT

Comes Now, Libellant herein, by and through Bogle, Bogle & Gates, its proctors, pursuant to Rule 31 of the Supreme Court Rules of Practice in Admiralty and Maritime Cases, and propounds the following interrogatories to be answered separately and fully in writing under oath by respondent herein or by any officer thereof competent to testify in its behalf:

I.

State the name of each and every ocean going cargo vessel, including specifically each and every Liberty or Victory type cargo vessel and each and every similar or larger cargo vessel, that discharged cargo at the Port of Kure, Japan, or entered said Port to discharge cargo, or was present in said Port for the purpose of discharging cargo, between December 1, 1950, and January 15, 1951.

II.

With respect to each vessel named in response to Interrogatory No. I above, state the following information:

- (a) The name of the owner of the vessel;
- (b) The name of the bareboat charterer of the vessel, if any;
- (c) The name of the voyage charterer of the vessel, if any;
- (d) The name of the time charterer of the vessel, if any.

III.

If any vessel named in response to Interrogatory I above was at the time mentioned in said interrogatory under time charter to respondent herein, state the following information with respect to the terms of that time charter:

- (a) The duration of the term of the charter as stated in the charter;
- (b) The date upon which said term commenced;
- (c) The duration of the period, if any, for which respondent herein had a right to extend or renew the term of said charter.

Dated at Seattle, Washington, June 23, 1955.

BOGLE, BOGLE & GATES,
Proctors for Libellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 23, 1955.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PRO-
POUNDED BY LIBELANT TO RESPOND-
ENT

Respondent answers to the interrogatories propounded by libellant as follows, restricting its answers to vessels under charter to the Military Sea Transportation Service in accordance with the order of the Court upon the hearing of respondent's exceptions:

I.

The following ocean-going vessels under charter to Military Sea Transportation Service were in the port of Kure, Japan, for the purpose of discharging cargo in the period between December 1, 1950, and January 15, 1951:

SS Clarksburg Victory
SS Simmons Victory
SS Earlham Victory
SS Loma Victory
SS Olympic Pioneer
SS Hibbing Victory
SS Marquette Victory
SS Berea Victory
SS Lynn Victory
SS Escanaba Victory
SS Gainesville Victory
SS Hunter Victory

II.

Vessel Name: SS Clarksburg Victory.

Owner: Maritime Administration.

Bareboat Charterer: Mississippi Shipping Co.,
Inc.

Vessel Name: SS Simmons Victory.

Owner: Maritime Administration.

Bareboat Charterer: A. H. Bull Steamship Co.

Vessel Name: SS Earlham Victory.

Owner: Maritime Administration.

Bareboat Charterer: States Marine Corp. of
Delaware.

Vessel Name: SSLoma Victory.

Owner: Maritime Administration.

Bareboat Charterer: States Marine Corp. of
Delaware.

Vessel Name: SS Olympic Pioneer.

Owner: Olympic Steamship Co.

Bareboat Charterer: (None.)

Vessel Name: SS Hibbing Victory.

Owner: Maritime Administration.

Bareboat Charterer: American Foreign Steam-
ship Co.

Vessel Name: SS Marquette Victory.

Owner: Maritime Administration.

Bareboat Charterer: Pacific-Atlantic Steamship
Co.

Vessel Name: SS Berea Victory.

Owner: Maritime Administration.

Bareboat Charterer: Blidberg Rothchild Co.

Vessel Name: SS Lynn Victory.

Owner: Maritime Administration.

Bareboat Charterer: Dolphin Steamship Corp.

Vessel Name: SS Escanaba Victory.

Owner: Maritime Administration.

Bareboat Charterer: North American Shipping
& Trading Company.

Vessel Name: SS Gainesville Victory.

Owner: Maritime Administration.

Bareboat Charterer: American Mail Line, Ltd.

Vessel Name: SS Hunter Victory.

Owner: Maritime Administration.

Bareboat Charterer: Moore-McCormack Lines.

None of the vessels named above was under any voyage charter and all were time chartered to the United States through Military Sea Transportation Service.

III.

The duration of the terms of the time charters of all the vessels named above was "a period of about 120 days from the time of delivery of the vessel or to the termination of the voyage current at termination date." The dates upon which the terms commenced were as follows:

Vessel Name	Dated Term Commenced
SS Clarksburg Victory	September 6, 1950
SS Simmons Victory	September 7, 1950
SS Earlham Victory	October 2, 1950
SS Loma Victory	September 7, 1950
SS Olympic Pioneer	July 22, 1950
SS Hibbing Victory	August 30, 1950
SS Marquette Victory	August 13, 1950
SS Berea Victory	September 1, 1950
SS Lynn Victory	August 26, 1950
SS Escanaba Victory	August 30, 1950
SS Gainesville Victory	September 6, 1950
SS Hunter Victory	September 8, 1950

All the time charters of the vessels mentioned above provided that charterer had the privilege of

continuing the charter for a second period of about 120 days.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Asst. United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ GRAYDON S. STARING,
Atty., Department of Justice,
Proctors for Respondent.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed August 3, 1955.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the respondent United States of America and by leave of Court files its amended answer herein to the libel of Western Canada Steamship Company, Ltd., a corporation, in a cause of contract civil and maritime, and admits, denies and alleges as follows:

I.

Answering unto Article I of the libel, respondent admits the allegations thereof.

II.

Answering unto Article II of the libel, respondent admits that with respect to the matters and things in the libel alleged, respondent United States of America was acting by and through the Military Sea Transportation Service represented by its various offices and admits that respondent United States of American is now and at all times in the libel mentioned was a corporation sovereign. The remaining allegations of Article II of the libel are matters of law for consideration by the Court and require no answer.

III.

Answering unto Article III of the libel, respondent admits the allegations thereof.

IV.

Answering unto Article IV of the libel, respondent admits the allegations thereof.

V.

Answering unto Article V of the libel, respondent denies each and every, all and singular, the allegations thereof.

VI.

Answering unto Article VI of the libel, respondent alleges that under the charter the vessel was to be employed according to the terms and conditions of the said charter party and not otherwise or at all; that the vessel made two voyages with munitions of war belonging to respondent for use in Korea; that the first such voyage was from Mukilteo,

Washington, to Okinawa, from which the vessel returned to and arrived at Seattle, Washington, on October 13, 1950; that the second such voyage commenced November 10, 1950, and was from Bangor, Washington, to Moji, Kure and Kobe, Japan, where the cargo was discharged and from whence the vessel returned to and arrived at Seattle, Washington on February 12, 1951, where the vessel was redelivered. Respondent denies each and every, all and singular, the allegations not herein otherwise admitted.

VII.

Answering unto Article VII of the libel, respondent alleges that the rights and obligations of libelant and respondent under the said charter were in accordance with the terms and conditions of the said charter party MST-197 and not otherwise or at all. Respondent further alleges that it redelivered the said vessel to libelant within the period of the charter as shown by the terms and conditions of the said charter party. Respondent denies each and every, all and singular, the allegations not herein otherwise admitted.

VIII.

Answering unto Article VIII of the libel, respondent alleges that following the redelivery of the said vessel libelant addressed to Military Sea Transportation Service a certain letter dated February 28, 1951, wherein libelant made demand for certain charter hire at the charter rate and also for a certain sum not provided for in the said charter party; that all the charter hire so demanded to the extent

that such charter hire was provided for in the charter party has been paid by respondent to libelant; that the Contracting Officer, Military Sea Transportation Service, wrote to libelant a letter under date of April 23, 1951, and also a letter under date of July 2, 1951, stating that no further sum was due to libelant under the said charter party. Respondent's proctors have not received information sufficient to answer the allegation that libelant presented a claim to the Comptroller General and that such claim was rejected and upon that ground respondent denies the said allegation. Respondent denies each and every, all and singular, the allegations not herein otherwise admitted.

IX.

Answering unto Article IX of the libel, respondent denies each and every, all and singular, the allegations thereof.

X.

Answering unto Article X of the libel, respondent denies each and every, all and singular, the allegations thereof.

Further Answering Unto the Libel and for a First Separate and Affirmative Defense Thereto, Respondent Alleges as Follows:

XI.

As of July 26, 1950, libelant, as owner of the Canadian Flag Vessel Lake Sicamous, Official No. 175,596, entered into a written time charter of the Lake Sicamous with respondent under the terms, provisions and conditions of a certain charter party

designated No. MST-197, a duplicate original of which is in the possession of libelant, for a period of about 120 days from the time of delivery of the vessel or to the termination of the voyage current at termination date at a charter hire of \$1,125 per diem, the said vessel being so chartered pursuant to the terms and provisions of the said charter party and not otherwise or at all. The said charter party is referred to by the libelant in Article III of the libel.

XII.

That the said Charter Party MST-197 between libelant and respondent provides in part as follows:

“Article 32. Disputes”

“Except as otherwise provided in this contract any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail, or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard

and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

XIII.

That the said Charter Party MST-197 provides in part as follows:

"Article 29. Revision of Rate of Hire."

"(a) General Revision.

"(1) The rate of hire specified in Article 2 may be increased or decreased in accordance with this Article.

"(2) Demand for negotiation. At any time subject to the limitations specified in this Article, either the Charterer or the Contractor may deliver to the other a written demand that the parties negotiate to revise the rate of hire under this Charter Party * * * Each demand for negotiation shall specify a date (identical with or subsequent to the date of delivery of the demand) on which any resulting revision of the rate of hire shall be effective. This date is hereinafter referred to as 'the effective date of the revision of hire.' Any demand made under this Article, if made by the Contractor, shall state briefly the ground or grounds therefor and shall be accompanied by the statements and data referred to in paragraph (3) of this Article. * * *

* * *

“(4) Negotiation.

“(A) Upon the filing of the statements and data required by paragraph (3) of this Article, the Contractor and the Contracting Officer will negotiate in good faith to agree upon a rate of hire to be effective on the effective date of the revision of hire. Negotiations for revisions of hire under this Article will be conducted on the same basis employing the same types of data, including without limitations, comparative prices, comparative costs, and trends thereof, as in negotiating hire for a new Military Sea Transportation Service contract.

“(B) After such negotiations the agreement reached will be evidenced by a supplemental agreement to this Charter Party stating the revised rate of hire to be effective on the effective date of the revision of hire (or such other later date as the parties may fix in such supplemental agreement).

“(5) Disagreements. If, within thirty days after the date on which the statements and data are required to be filed pursuant to paragraph (2) of this Article (or such further period as may be fixed by written agreement) the Contracting Officer and the Contractor fail to agree to a revised rate of hire, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article 32 (Disputes) and the rate of hire so fixed shall remain in effect for the balance of the Charter Party notwithstanding any other provision of this Article.

“(6) Payments. Until the revised rate of hire shall have become effective in accordance with this Article, the rate of hire in force at the time the demand was made for negotiations shall be paid, subject to appropriate later adjustment made pursuant to paragraph (4) or (5) of this Article.” * * *

XIV.

That libelant has failed to fulfill a condition precedent to its claim for additional hire by failure to comply with the provisions of Article 29 of the said charter party with respect to increase of the rate of hire by failing to deliver to respondent any written demand under the terms and provisions of Article 29, stating that libelant desired to negotiate the revision of the rate of charter hire; and that by such failure so to notify respondent in writing of its desire to negotiate the rate of charter hire, in accordance with the terms and conditions of the said charter party, including the said Article 29, the rate of hire specified in Article 2 of the said charter party, to wit, \$1,125 per diem, remained in full force and effect during the entire time when the said charter party was in force and until the redelivery of the said vessel on February 12, 1951.

Further Answering Unto the Libel and for a Second Separate and Affirmative Defense Thereto, Respondent Alleges as Follows:

XV.

* * *

Further Answering Unto the Libel and for a Fourth Separate and Affirmative Defense Thereto, Respondent Alleges as Follows:

XIX.

Respondent incorporates, refers to and makes a part hereof as though fully set forth herein all the allegations of Article XI of respondent's first separate and affirmative defense to the libel.

XX.

That the Lake Sicamous, on her second voyage under the said Charter Party MST-197, commencing November 10, 1950, carried munitions of war to the Ports of Moji, Kure and Kobe, Japan, during a period when the United States and other members of the United Nations Organization were engaged in war or warlike operations in Korea; that large quantities of the supplies and munitions required for such war or warlike operations were shipped to and transshipped from and handled in the Japanese Ports of Moji, Kure and Kobe; that the supplies and munitions thus shipped to and from and handled in the said ports far exceeded what the said ports were equipped to handle with dispatch and in consequence ships arriving at the said ports with cargo during the period of the said second voyage of the Lake Sicamous suffered delay in discharging their cargoes because of the limited equipment and facilities of the said ports and because of the urgent needs of the United States and the United Nations Organization in the conduct of operations of war for

particular cargoes of supplies and munitions, all of which conditions were actually or constructively known to libelant at the time the said charter party was executed; that the officers, employees and agents of respondent used due care and employed their best efforts consistent with the requirements of the war or warlike operations then in progress to prevent and reduce such delays and to discharge the cargo of the *Lake Sicamous* with all possible dispatch; and that any delay in discharging the *Lake Sicamous* was due to the said lack of equipment and facilities and to the said urgent needs of the United States and the United Nations Organization in connection with the conduct of the war or warlike operations in Korea and not to any negligence or fault of respondent.

XXI.

That libelant chartered the *Lake Sicamous* to respondent for the purpose of carrying supplies and munitions of war to the Far East for use in war or warlike operations in Korea, well knowing that the vessel would be used for such purpose and well knowing the nature and extent of such war or warlike operations and the conditions resulting therefrom with respect to the handling of cargo in the Ports of Japan; and that libelant assumed the risk of any and all the matters and things complained of in the libel.

Further Answering Unto the Libel and for a Fifth Separate and Affirmative Defense Thereto, Respondent Alleges as Follows:

XXII.

That respondent incorporates, refers to and makes a part hereof as though fully set forth herein all the allegations of Article XI of respondent's first separate and affirmative defense of the libel and Article XX of respondent's fourth separate and affirmative defense to the libel.

XXIII.

That any delay in discharging the Lake Sicamous in the Ports of Moji, Kure and Kobe and all the matters and things complained of in the libel were caused by the act or acts of the United Nations Organization and by the act or acts of a sovereign government or sovereign governments acting in their sovereign capacities in the conduct of war or war-like operations.

Further Answering Unto the Libel and for a Sixth Separate and Affirmative Defense Thereto, Respondent Alleges as Follows:

XXIV.

That respondent incorporates, refers to and makes a part hereof as though fully set forth herein all the allegations of Article XI of respondent's first separate and affirmative defense to the libel, and Article XX of respondent's fourth separate and affirmative defense to the libel.

XXV.

That the said Charter Party MST-197 provides in part as follows:

“Article 21. Exceptions. The act of God, enemies, fire, restraint of princes, rulers or people, and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation throughout this Charter Party always mutually excepted. The Vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property, or to go into drydock or into ways with or without cargo on board.”

XXVI.

That any delay in discharging the Lake Sicamous in the Ports of Moji, Kure and Kobe, and all the matters and things complained of in the libel, were caused by the act or acts of the United Nations Organization and by the act or acts of a sovereign government or sovereign governments acting in their sovereign capacities in the conduct of war or warlike operations, and all such delay and all the matters and things complained of in the libel were the result of restraint of princes, rulers or people within the provisions of the said Article 21 of the said charter party.

Wherefore, respondent prays that the libel herein be dismissed with costs.

CHARLES P. MORIARTY,
United States Attorney;

By /s/ F. N. CUSHMAN,

Assistant United States At-
torney;

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney General, Proctors
for Respondent.

Receipt of Copy acknowledged.

Lodged February 15, 1955.

[Endorsed]: Filed August 3, 1955.

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 15848

WESTERN CANADA STEAMSHIP CO., LTD.,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORAL DECISION

This Matter having come on for hearing before the Honorable John C. Bowen, Judge of the above-entitled Court, on August 3, 1955; all parties being present or represented by counsel; all parties having been heard and all parties having rested, the Court thereupon rendered the following

Oral Decision

The Court: The Court has been impressed by the very well ordered and strong arguments of counsel on both sides. I do not know when I have heard clearer statements of the respective positions of litigants than counsel have made in this case on this occasion.

There is nothing plainer in the law that I know of than that contracting parties are not responsible for interruptions of contract performance by the processes of Government, and it does not make too much difference what kind of a form those Government acts take, whether they compel civil acts or whether they are warlike operations.

In this case, the obligation of the United States, through its War Shipping Administration, to return the vessel to the charterer at the expiration of the term of the charter without unnecessary delay was interfered with and rendered impossible by the governmental operations of the United States or of the over-all command of the United Nations acting for the United States and other sovereignties which in concert and carrying on those governmental operations, whatever they were properly called, whether they were the Korean War itself or whether they were war connected police activities of a State or of an organization of member states.

The fact is that the ports of Japan—no one could doubt the proof on that—were congested everywhere as a result of efforts by the United States, as

a member of or in behalf of that concert of nations in that enterprise to get ammunition into Korea to meet a great national and international military emergency.

All of the acts and things done and omitted which were complained of by libelant in this action, wherever occurring, were those things which, as to things omitted, were excused by reason of the fact that they were compelled by the warlike and lawful police Governmental activities of the United States and of the United Nations and its member nations in their concerted support and contribution to that Korean war. None of the acts done which were complained of by libelant were done under any other circumstances. For all such acts and things done and omitted, the United States as a respondent in this action is not liable.

The Court finds, concludes and decides that the libelant recover nothing by reason of its libel in this action and the amendment thereto filed on the eve of trial.

Mr. Knudsen: If the Court please, might I suggest to the Court that with respect to the delay at Bangor there was no——

The Court (Interposing): The Court has made its decision and cannot, profitably to counsel, have any further discussion of the matter.

[Endorsed]: Filed September 2, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 3rd, 4th and 22nd days of August, 1955, libellant being represented by Bogle, Bogle & Gates, and C. Calvert Knudsen, Esquire, and respondent being represented by Charles P. Moriarty, Esquire, United States Attorney; F. N. Cushman, Esquire, Assistant United States Attorney; Keith R. Ferguson, Esquire, Special Assistant to the Attorney General, and Graydon S. Staring, Esquire, Attorney, Department of Justice, and the parties having advised of their readiness for trial and evidence both oral and documentary having been introduced and briefs having been filed and oral argument made by the parties and the cause thereafter having been submitted for decision and the Court, having been fully advised in the premises, after due deliberation, makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Libellant is a corporation organized and existing under the laws of the Dominion of Canada and was at all material times the owner of the SS Lake Sicamous, a Canadian flag vessel, Official No. 175596.

II.

On July 26, 1950, libellant time chartered the SS Lake Sicamous to respondent United States of

America, acting through the Military Sea Transportation Service of the Department of the Navy, under Time Charter Party MST-197, for a period of "about 120 days from the time of delivery of the Vessel or to the termination of the voyage current at termination date" with world-wide trading limits. The charter party provided in Article 21 a mutual exception of restraint of princes, rulers or people. The master was appointed and the crew engaged by the libelant and the master and crew were employees of libelant. Under the Charter Party the cargo was to have been loaded and discharged by respondent at its own cost and expense.

III.

Charter Party MST-197 provided in Article 29 that the rate of charter hire might be increased or decreased under procedure there fully specified. Article 29 provided that either party might deliver a written demand for negotiation to the other specifying a date, not prior to the date of demand, when the proposed revision should be effective, such demand to be accompanied by certain specified statements and data, and further provided that negotiations should thereupon be entered into by the parties pursuant to further provisions of the said article with respect to the basis of negotiations and the resolution of disagreements.

IV.

By admission of the parties, in entering into Charter Party MST-197, the libelant and respondent

contemplated two round voyages of the SS Lake Sicamous from the West Coast of the United States to ports in the Far East, carrying munitions of war for the armed forces of the United States engaged in hostilities in Korea. At the time of entering into the charter party both libelant and respondent knew the facts hereinafter set forth in numbers XI and in the first two sentences of XIII of these findings of fact.

V.

The Lake Sicamous was delivered by libelant to respondent at Seattle, Washington, under the charter party at 12 o'clock noon Pacific Daylight Saving Time, August 4, 1950, and was thereafter operated as a merchant vessel for respondent until the time of her redelivery. The vessel loaded at Mukilteo, Washington, sailed on her first voyage August 25, 1950, discharged her cargo at Okinawa and returned to Seattle arriving October 13, 1950.

VI.

On October 17, 1950, the Lake Sicamous arrived at the Naval Ordnance Depot, Bangor, Washington, to load a cargo of ammunition for her second voyage. At Bangor, without evidence disclosing objection from libelant, she was laden with approximately 7,000 tons of 105mm and 155mm Howitzer shells for the use of the Army ground forces and approximately 2,800 tons of 5-inch rockets for the use of the Air Force. Loading was completed November 10, 1950. The redelivery of the Lake Sicamous to libelant was not delayed by any inexcusable act or

omission connected with the loading of her cargo at Bangor.

VII.

On November 10, 1950, without evidence disclosing objection from libelant, the *Lake Sicamous* sailed on her second voyage. Before sailing her master received from the Naval Control of Shipping Officer at Seattle secret routing instructions of the type commonly given vessels in wartime, which provided that at a certain point en route the vessel might receive a radio message in code with further instructions as to her port of destination. Such further instructions were received en route in accordance with which the ship put into the Port of Moji, Japan, arriving December 6, 1950.

VIII.

At Moji from December 10 to December 12, 1950, the cargo of rockets for the Air Force, amounting to 2,800 tons, was discharged. The ship was then directed to the Port of Kure, Japan, for the discharge of her remaining cargo.

IX.

The *Lake Sicamous* arrived at Kure December 13, 1950, and anchored to await a berth. Thereafter and as soon as discharging facilities were available, in accordance with military priorities then in effect and the urgent needs of the armed forces engaged in hostilities in Korea, she was afforded discharging facilities and commenced to discharge January 12, 1951. Her discharge was completed January 19,

1951, on which date she departed Kure for Kobe for the purpose of bunkering and provisioning.

X.

The Lake Sicamous arrived at Kobe January 20, 1951, bunkered and sailed January 21, 1951, for Seattle, where she arrived and was redelivered to libelant February 12, 1951.

XI.

At all material times the Islands of Japan were occupied and controlled by a group of sovereign powers, of which the United States was one.

XII.

At all material times the Port of Kure was occupied and controlled by British Commonwealth forces and was the headquarters of British Commonwealth forces in Japan. During the period when the Lake Sicamous lay in the Port of Kure, United States armed forces were permitted by the Commander of British Commonwealth forces to use certain facilities of the Port of Kure for the purpose of loading and discharging cargoes of American vessels. During such period priority in the use of such facilities was enjoyed by British and other vessels supplying British Commonwealth forces.

XIII.

At all material times United States armed forces were engaged in hostilities in Korea pursuant to a request of the United Nations Organization and under United Nations command. The United States armed forces so engaged were based upon Japan and supplied through Japanese ports. The ports of

Japan were congested everywhere as a result of efforts by the United States as a member of or in behalf of a concert of nations to get ammunition into Korea to meet a great national and international military emergency.

XIV.

Throughout the autumn of 1950 and early winter of 1951 and at all material times military operations in Korea had imposed heavy burdens on the facilities of all the military ports of Japan and had taxed the capacity of those ports, including in particular the Ports of Moji and Kure, to handle military cargo and particularly to handle ammunition because of the special handling required by ammunition, the regulations applicable to it, the danger to vessels, ports, population and equipment and the precautions necessary in its movement and storage.

XV.

In early December, 1950, and at all material times thereafter, military developments in Korea had resulted in an urgent need on the part of the United States armed forces for aircraft ammunition, including 5-inch rockets, and a relatively low demand for ground forces ammunition, including 105mm and 155mm Howitzer shells. As a result, in the discharge and handling of cargoes in military ports in Japan, aircraft ammunition, including 5-inch rockets, was regarded and treated of the highest priority, and ground forces ammunition, including 105mm and 155mm Howitzer shells, was regarded and treated as of very low priority.

XVI.

Any delay suffered by the *Lake Sicamous* in completing her second voyage under the charter party and being redelivered to her owners was the result of the operation of military priorities, the urgent needs of United States forces engaged in military operations and the governmental operations of the United States or of the over-all command of the United Nations acting for the United States and other sovereignties which were in concert and carrying on those governmental operations, whatever they were properly called, whether they were the Korean War itself or whether they were war-connected police activities of a state or of an organization of member states.

XVII.

Respondent exercised reasonable diligence in all the circumstances in its performance of Charter Party MST-197.

XVIII.

Libelant failed to perform the terms and conditions of Article 29 of the charter party by failing to make any demand for negotiations for a revision of the rate of charter hire under the terms and conditions of Article 29.

Conclusions of Law

I.

This Court has jurisdiction of this action under the Suits in Admiralty Act, Title 46, U.S.C., Sections 741 et seq.

II.

The Lake Sicamous was redelivered to libelant by respondent within the period provided in Charter Party MST-197 between libelant and respondent.

III.

Any and all delay suffered by the Lake Sicamous on her second voyage under the charter party and all of the acts and things done and omitted which were complained of by libelant in this action, wherever occurring, were things which were excused by reason of the fact that they were compelled by the warlike and lawful police and governmental activities of the United States and of the United Nations and its member nations in their concerted support and contribution to the Korean War. None of the acts done which were complained of by libelant were done under any other circumstances. For all such acts and things done and omitted, the United States as a respondent in this action is not liable.

IV.

Respondent has fully performed all the matters and things to be performed by it under the charter party and has committed no breach of its charter party with libelant.

V.

Libelant has failed to prove the material allegations of its libel and has failed to prove any cause of action against respondent.

VI.

Respondent is entitled to a decree dismissing the libel with costs.

It Is Therefore Ordered that a decree be entered in favor of respondent and that the libel be dismissed with costs.

Done in open court this 19th day of September, 1955.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Assistant United States At-
torney;

/s/ KEITH R. FERGUSON,
Special Assistant to the At-
torney General,

/s/ GRAYDON S. STARING,
Attorney, Department of Justice, Proctors for Re-
spondent, United States of America.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

FINAL DECREE

This cause having come on regularly for trial on the 3rd, 4th and 22nd days of August, 1955, libelant being represented by Bogle, Bogle & Gates, and C. Calvert Knudsen, Esquire, and respondent being represented by Charles P. Moriarty, Esquire, United States Attorney, F. N. Cushman, Esquire, Assistant United States Attorney, Keith R. Ferguson, Esquire, Special Assistant to the Attorney General, and Graydon S. Staring, Esquire, Attorney, Department of Justice, and the parties having advised of their readiness for trial and evidence both oral and documentary having been introduced and briefs having been filed and the matter having been argued and submitted by the advocates of the respective parties, and the Court after due deliberation having delivered its oral decision on August 22, 1955, in favor of respondent and having thereafter made and entered its findings of fact and conclusions of law, it is hereby

Ordered, Adjudged and Decreed that the libel herein be and the same is hereby dismissed on the merits with prejudice and that respondent have and recover from libelant the respondent's taxable costs in the amount of \$63.00, which are hereby taxed, and that libelant recover no costs against respondent.

Done in open Court this 12th day of September, 1955.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and approved by:

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney,

/s/ KEITH R. FERGUSON,
Special Assistant to
the Attorney General,

/s/ GRAYDON S. STARING,
Attorney, Department of Justice, Proctors for Re-
spondent.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered September 19,
1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL BY LIBELANT

To: United States of America, Respondent, and
Charles P. Moriarty, United States Attorney,
Its Proctor:

You, and each of you, will please take notice that Western Canada Steamship Company, Ltd., libelant herein, appeals to the United States Court of Appeals for the Ninth Circuit from the Findings of Fact, Conclusions of Law and Final Decree of this Court made and entered herein on September 19,

1955, and from each and every part of said Findings of Fact, Conclusions of Law and Final Decree.

Dated this 15th day of December, 1955.

BOGLE, BOGLE & GATES,
Proctors for Libelant.

ORDER ALLOWING APPEAL

It is hereby ordered that the appeal herein be and the same hereby is allowed.

Done in Open Court this 15th day of December, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by :

/s/ C. CALVERT KNUDSEN,
Of Bogle, Bogle & Gates,
Proctors for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 15, 1955.

[Title of District Court and Cause.]

LIBELANT'S ASSIGNMENT OF ERRORS

Libelant hereby assigns error in the trial and proceedings before the Court and in the Findings of Fact, Conclusions of Law and Final Decree entered and filed herein on September 19, 1955, as follows:

1. That the Court erred in finding that the redelivery of the Lake Sicamous to libelant was not delayed by any inexcusable act or omission connected with the loading of her cargo at Bangor, Washington. (Finding of Fact VI).

2. That the Court erred in failing to find and conclude that the redelivery of the Lake Sicamous to libelant was delayed 11 days, 17 hours and 15 minutes by reason of the failure of respondent to load and stow the vessel within a reasonable time and with reasonable diligence at Bangor, Washington.

3. That the Court erred in finding that the Lake Sicamous was afforded discharging facilities and commenced to discharge as soon as discharging facilities were available after her arrival at Kure, Japan, in accordance with military priorities then in effect and the urgent needs of the armed forces engaged in hostilities in Korea. (Finding of Fact IX).

4. That the Court erred in failing to find and conclude that the redelivery of the Lake Sicamous to libelant was delayed by 29 days, 22 hours and 20 minutes at Kure, Japan, by reason of congestion of the port created by respondent's having ordered too many ships into the port and contributed to by respondent's failure to provide for adequate storage facilities ashore at said port to receive the cargo aboard said ships.

5. That the Court erred in finding that the ports of Japan were congested everywhere as a result of efforts by the United States as a member of or in behalf of a concert of nations to get ammunition into Korea to meet a great national and international military emergency. (Finding of Fact XIII).

6. That the Court erred in finding that throughout the autumn of 1950 and early winter of 1951 and at all material times military operations in Korea had imposed heavy burdens on the facilities of all the military ports of Japan and had taxed the capacity of those ports, including in particular the ports of Moji and Kure, to handle military cargo and particularly to handle ammunition because of the special handling required by ammunition, the regulations applicable to it, the danger to vessels, ports, population and equipment and the precautions necessary in its movement and storage. (Finding of Fact XIV).

7. That the Court erred in finding that any delay suffered by the *Lake Sicamous* in completing her second voyage under the charter party and being redelivered to her owners was the result of the operation of military priorities, the urgent needs of United States forces engaged in military operations and the Governmental operations of the United States or of the over-all command of the United Nations acting for the United States and other sovereignties which were in concert and carrying on those Governmental operations, whatever they were

properly called, whether they were the Korean War itself or whether they were war-connected police activities of a state or of an organization of member states. (Finding of Fact XVI).

8. That the Court erred in failing to find and conclude that the delay in the redelivery of the *Lake Sicamous* to libellant was proximately caused by the fault and neglect of respondent in failing to load and stow the vessel at Bangor, Washington, with reasonable diligence, and in failing to provide discharging facilities and discharge the vessel with reasonable diligence at Kure, Japan, and particularly that said redelivery was unreasonably delayed for 11 days, 17 hours and 15 minutes as the proximate result of the failure of respondent to load and stow the vessel with reasonable diligence at Bangor, Washington, and that said redelivery was unreasonably delayed for 29 days, 22 hours and 20 minutes as the proximate result of the failure of respondent to provide discharging facilities and discharge the vessel with reasonable diligence at Kure, Japan.

9. That the Court erred in finding that respondent exercised reasonable diligence in all the circumstances in its performance of charter party MST-197. (Finding of Fact XVII.)

10. That the Court erred in finding that libellant failed to perform the terms and conditions of Article 29 of the charter party by failing to make any demand for negotiations for a revision of the rate

of charter hire under the terms and conditions of Article 29. (Finding of Fact XVIII).

11. That the Court erred in failing to find and conclude that Article 29 of the charter party is not applicable to libelant's claim asserted in this libel.

12. That the Court erred in failing to find and conclude that in any event libelant properly demanded negotiations for a revision of the rate of charter hire under the terms and conditions of Article 29 of the charter party.

13. That the Court erred in failing to find and conclude that respondent waived and is estopped to assert any failure of libelant to comply with Article 29 of the charter party by refusing to entertain or act upon libelant's claim for damages for breach of charter party under Article 32 of the charter party (the Disputes Clause).

14. That the Court erred in failing to find and conclude that respondent waived and is estopped to assert any failure of libelant to comply with Article 29 of the charter party, and any such failure is excused, by the failure of respondent to object to the sufficiency of the notice given or demand made thereunder by libelant at a time when libelant could have cured any such insufficiency of notice or demand.

15. That the Court erred in failing to find the market rate of charter hire for vessels similar to the Lake Sicamous under terms and conditions similar to those of MST-197 during the period of un-

reasonable delay, and in failing to find the difference between that market rate of charter hire and the charter rate of hire.

16. That the Court erred in concluding that the Lake Sicamous was redelivered to libelant by respondent within the period provided in charter party MST-197 between libelant and respondent. (Conclusion of Law II).

17. That the Court erred in concluding that any and all delays suffered by the Lake Sicamous on her second voyage under the charter party and all of the acts and things done and omitted which were complained of by libelant in this action, wherever occurring, were things which were excused by reason of the fact that they were compelled by the war-like and lawful police and Governmental activities of the United States and of the United Nations and its member nations in their concerted support and contribution to the Korean War, and that none of the acts done which were complained by libelant were done under any other circumstances, and that for all such acts and things done and omitted the United States as a respondent in this action is not liable. (Conclusion of Law III).

18. That the Court erred in concluding that respondent has fully performed all the matters and things to be performed by it under the charter party and has committed no breach of its charter party with libelant. (Conclusion of Law IV).

19. That the Court erred in concluding that libelant has failed to prove the material allegations of its libel and has failed to prove any cause of action against respondent. (Conclusion of Law V).

20. That the Court erred in concluding that respondent is entitled to a decree dismissing the libel with costs. (Conclusion of Law VI).

21. That the Court erred in failing to find and conclude that respondent breached the charter party by failing to load and stow the vessel with reasonable diligence at Bangor, Washington, and by failing to provide discharging facilities and discharge the vessel with reasonable diligence at Kure, Japan.

22. That the Court erred in failing to find and conclude that the libelant is entitled to recover damages from respondent for 41 days, 15 hours and 35 minutes unreasonable delay in redelivery of the vessel to libelant, and that the measure of said damages should be the difference between the charter rate of hire and the market rate of hire during the period of unreasonable delay.

23. That the Court erred in entering its final decree on September 19, 1955, dismissing libelant's libel herein and awarding respondent its costs against libelant in the sum of \$63.00 and decreeing that libelant recover no costs against respondent.

24. That the Court erred in failing to enter a final decree herein that libelant have and recover

from respondent its damages computed as aforesaid and its taxable costs and disbursements.

BOGLE, BOGLE & GATES.

/s/ C. CALVERT KNUDSEN,
Proctors for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 15, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That the undersigned principal and the undersigned surety are held and firmly bound unto the United States of America in the penal sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, for the payment thereof to the benefit of whom it may concern; and that the said principal and the said surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of December, 1955.

The conditions of this obligation are such, that

Whereas, Western Canada Steamship Company, Limited, libelant herein, has appealed to the United States Court of Appeals for the Ninth Circuit from

the Findings of Fact, Conclusions of Law and Final Decree entered herein by the United States District Court, Western District of Washington. Northern Division, on September 19, 1955.

Now, Therefore, if the above bounden principal shall pay all costs and expenses which shall be awarded against it by any Appellate Court, then this obligation to be void, otherwise to remain in full force and effect.

WESTERN CANADA STEAMSHIP COMPANY, LIMITED, A CORPORATION,

By BOGLE, BOGLE & GATES,

/s/ C. CALVERT KNUDSEN,

Its Proctors,

Principal.

[Seal]

FIREMANS FUND

INDEMNITY COMPANY,

By /s/ CLAUDE WAKEFIELD,

Its Attorney in Fact,

Surety.

This bond approved as to form and amount and sufficiency of surety.

Done in Open Court this 15th day of December, 1955.

/s/ JOHN C. BOWEN,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed December 15, 1955.

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America,
State of Washington,
County of King—ss.

The President of the United States

To: United States of America, Respondent, and
Charles P. Moriarty, United States Attorney,
Its Proctor:

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit forty (40) days after the date of this citation pursuant to an appeal duly taken and obtained from the Findings of Fact, Conclusions of Law and Final Decree entered herein by the United States District Court, Western District of Washington, Northern Division, on September 19, 1955, wherein Western Canada Steamship Company, Limited, is Appellant, and United States of America is Appellee, to show cause, if any there be, why the said Findings of Fact and Conclusions of Law and Final Decree should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Bowen, Judge of the United States District Court, Western Dis-

trict of Washington, Northern Division, this 15th day of December, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed December 15, 1955.

[Title of District Court and Cause.]

LIBELANT'S STATEMENT OF
POINTS ON APPEAL

Comes now Western Canada Steamship Company, Ltd., libelant herein, and incorporates here by this reference its assignment of errors, heretofore served and filed herein, as its Statement of Points on Appeal.

BOGLE, BOGLE & GATES,
/s/ C. CALVERT KNUDSEN,
Proctors for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 23, 1955.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS TO COURT OF APPEALS

Stipulation

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective proctors of record herein, that libelant's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 19 and 20, all of which were admitted in evidence at the trial of this cause, may be transmitted to the United States Court of Appeals for the Ninth Circuit in their original form for use in connection with the appeal herein.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney,
Proctors for Respondent.

BOGLE, BOGLE & GATES,
/s/ C. CALVERT KNUDSEN,
Proctors for Libelant.

Order

Purusuant to the foregoing Stipulation, it is hereby

Ordered that libelant's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 19 and 20, which were admitted in evidence at the trial of this cause, shall be transmitted

in their original form to the United States Court of Appeals for the Ninth Circuit for use in connection with the appeal herein.

Done in Open Court this 23rd day of December, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ C. CALVERT KNUDSEN, of
BOGLE, BOGLE & GATES,
Proctors for Libellant.

Approved and notice of presentation hereby expressly waived:

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney,
Proctor for Respondent.

[Endorsed]: Filed December 23, 1955.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR EXTENSION OF TIME

Stipulation

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective proctors of record herein, that the time within which the record and transcript on appeal shall be filed with the United States Court of Appeals for the Ninth Circuit, and the appeal there docketed, may

be extended to and including March 1, 1956, which is a day not more than 90 days from the date of filing the notice of appeal herein.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney,
Proctors for Respondent.

BOGLE, BOGLE & GATES,
/s/ C. CALVERT KNUDSEN,
Proctors for Libellant.

Order

Pursuant to the foregoing Stipulation, it is hereby

Ordered that the time within which the record and transcript on appeal herein shall be filed with the United States Court of Appeals for the Ninth Circuit and the appeal there docketed be and the same hereby is extended to and including March 1, 1956.

Done in Open Court this 23rd day of December, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ C. CALVERT KNUDSEN, of
Bogle, Bogle & Gates,
Proctors for Libellant.

Approved and notice of presentation hereby expressly waived:

/s/ F. N. CUSHMAN,

Assistant U. S. Attorney,

Proctor for Respondent.

[Endorsed]: Filed December 23, 1955.

In the District Court of the United States for the
Western District of Washington, Northern Division

In Admiralty No. 15848

WESTERN CANADA STEAMSHIP COMPANY, LIMITED, a Corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Before: The Honorable John C. Bowen, District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

August 3, 1955—10:00 A.M.

Appearances:

STANLEY B. LONG, ESQ. and
C. CALVERT KNUDSEN, ESQ., of
BOGLE, BOGLE & GATES,

Appearing for and on Behalf of Libelant.

FRANK N. CUSHMAN,

Assistant U. S. Attorney, and

GRAYDON S. STARING, ESQ.,

Appearing for and on Behalf of Respondent.

The Court: Are parties and counsel ready to proceed in Cause No. 15848? Mr. Cushman?

Mr. Cushman: Your Honor, I would like to introduce Mr. Staring. He has appeared before you before. He is assistant to Keith Ferguson, Special Assistant to the Attorney General, head of the Admiralty Section on the West Coast.

The Court: Mr. Staring, the Court again welcomes you and advises that it is agreeable to the Court for you to appear as assisting counsel in this case without however displacing local counsel and that your doing so is subject to the rules of Court regarding the conduct of counsel as such [2*] rules affect the conduct of local counsel.

Mr. Staring: It is a pleasure to appear before Your Honor.

The Court: In the case of Western Canada Steamship Company, Limited, vs. United States, No. 15848 in Admiralty, are the parties and counsel ready to proceed with that trial?

Mr. Knudsen: Libelant is ready to proceed, your Honor, and there are certain motions pending which are to be disposed of at the commencement of the trial. I think the first in order of time is the libelant's motion for the production of certain documents.

The Court: I wish you would not proceed to argue. I want to ask opposing counsel the same question to which you have apparently made response.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Staring: Respondent is ready to proceed, Your Honor.

The Court: You may now proceed with the matters mentioned by Mr. Knudsen or any other matters pertinent to the trial.

Mr. Knudsen: Thank you, Your Honor.

The first matter was libelant's motion to produce, and I understand that counsel for the Government has with him his file in this matter, and he will make it [3] available to me at the recess. So I will reserve my motion until I have had a chance to examine what has been produced. I don't believe there will be any difficulty with that.

The Court: May the record show agreeably to counsel now present that each and all of the litigants in this case, which is Admiralty Cause No. 15848, are present and/or represented by counsel?

Mr. Knudsen: Yes, Your Honor.

The Court: Is that agreeable to respondent?

Mr. Staring: That is agreeable to respondent.

The Court: I ask you to respond audibly to the Court's questions.

You may proceed.

Mr. Knudsen: The second matter insofar as libelant is concerned is libelant's motion for leave to amend the libel by increasing the amount of damages and increasing the prayer, and I was advised this morning by Mr. Staring that the Government has no objection to that amendment.

The Court: Any objection?

Mr. Staring: If Your Honor please, that is correct with the condition that I should like to reserve

my agreement to that until such time as respondent's motion for leave to file an amended answer [4] is disposed of.

The Court: The Court denies the request for postponement. The request for amendment is granted, and I wish you to suggest how most conveniently may the amendment be effected? May it be done by interlineation of the libel?

Mr. Knudsen: Yes, if the Court please, it could be done in that manner. It could be interlined in paragraph V of the libel.

The Court: Will you suggest the words, and I will write them down on a piece of paper and consider them?

Mr. Knudsen: In the next to the last line——

The Court: It is line 29 on page 2 of this original form on file. That is the original libel.

Mr. Knudsen: In the original libel, if the Court please, at line 4 on page 3——

The Court: Wait just a moment. I wish you would pause on the first thought you expressed until we get through with that. What is it you want interlined in paragraph No. V?

Mr. Knudsen: I would like to substitute the amount of \$55,200.00.

The Court: Mr. Cushman, is it your understanding there is only one respondent, namely the United States [5] of America?

Mr. Cushman: Yes, Your Honor.

The Court: Does the respondent wish the Court

to deem that the original libel as amended be denied by the present form of the respondent's answer?

Mr. Cushman: Yes, Your Honor.

The Court: Let the record show that. That will be in effect irrespective of any amendment or further amendment of the answer.

Now, I think, Mr. Staring, that you started to make a statement that might be responsive to this particular amendment, did you? If so, I will hear you now.

Mr. Staring: There was also pending, Your Honor, a motion of respondent for leave to file an amended answer.

The Court: Well, does this not cover the proposed amendment?

Mr. Staring: No. The proposed amendment——

The Court: Then, is there any reason why we should not hear that at this time? We want to get the pleadings settled.

Proceed, Mr. Staring.

Mr. Staring: If Your Honor please, the Government by its motion proposed to file an amended answer [6] setting forth more fully its defenses.

The Court: Would you kindly advise the Court and opposing counsel what sort of amendment it is you wish to make, the substance and effect of your proposed amendment?

Mr. Staring: May I start by saying that we have agreed with opposing counsel that we will strike two of the proposed amendments which were stated in our proposed amended answer?

The Court: Have you done that in the form that you propose to file?

Mr. Staring: No, we have not, Your Honor.

The Court: Why do you not proceed to do that? Let us get going on the file. Mark out what you told counsel you would mark out. Get it done and then serve him with a copy of what you propose to file. The Court will then consider whether or not it is appropriate to file it.

Mr. Staring: The original, if Your Honor please, is in the hands of the Clerk.

(Whereupon, the document is returned to Mr. Staring by the Clerk.)

The Court: I wish counsel would confer with each other so as to become advised of the details involved.

(Whereupon, a conference was had between counsel [7] at counsel table.)

The Court: Now, do you ask the Court to strike from the respondent's original answer filed in this action under date of February 15, 1955, all of paragraph XIV on page 5, and also the Court is advised counsel for the respondent wishes to strike all of paragraph—

Mr. Staring: If Your Honor please, not Article XIV, but beginning with Article XV on page 5.

The Court: You do not wish to strike XIV?

Mr. Staring: We do not wish to strike XIV.

The Court: The Court now understands counsel for respondent asks to strike all of paragraph numbered XV.

Mr. Staring: And XVI.

The Court: Also paragraph numbered XVI.

Mr. Staring: And XVII.

The Court: And all of paragraph XVII.

Mr. Staring: And all of XVIII.

The Court: And all of paragraph numbered XVIII. Is that what you wish?

Mr. Staring: That is right, Your Honor.

The Court: Is there any objection to the Court granting that request?

Mr. Knudsen: No, Your Honor. [8]

The Court: That request is granted, and it is so ordered.

Is there anything else you wish to strike, Mr. Staring?

Mr. Staring: There is nothing more, Your Honor, that I wish to strike.

The Court: Would counsel on both sides initial the physical means employed by the Court to strike? Initial it in the margin if you approve of what has been done.

The Clerk says that counsel for the respondent wishes to strike, also, all of the statements made in lines 12 to 27, inclusive, on page 6 of the answer, which is: "Further answering unto the libel," etc., and then all of paragraph XVII and XVIII, is that right?

Mr. Staring: That is correct, Your Honor.

The Court: The Court grants that request.

Is there any other matter of amendment now, Mr. Staring? Does that complete your request regarding amendments?

Mr. Staring: That does complete the request with regard to striking portions.

The Court: Well, what else do you propose by way of amendment? [9]

Mr. Staring: We propose to amend the answer to set up a defense.

The Court: You had better file that.

Mr. Staring: It is on file, Your Honor.

The Court: Where is it?

Mr. Staring: It is in the proposed amended answer.

The Court: Is that on file?

Mr. Cushman: Yes, Your Honor.

The Court: Is there anything else in that proposed amendment other than what you now refer to as some additional matter which you wish to effectuate?

Mr. Staring, will you let Mr. Cushman say what the Government wants? I want to proceed, Mr. Cushman.

Mr. Cushman: Well, the proposed amended answer——

Mr. Staring: Well the proposed amended answer is on file and has been since February, and it is that answer which we seek to file.

The Court: Let it be filed.

Does that cover the matter?

Mr. Staring: That does, Your Honor.

The Court: Have you a copy of it, Mr. Knudsen?

Mr. Knudsen: Yes, Your Honor, and I have certain objections which I would like the Court to hear.

The Court: Well, strike the Court's statement about it being filed, and I will hear your objection. [10]

Mr. Knudsen: Well, the amended answer does two things.

(Argument.)

The Court: The request to file the amended answer is granted, and it is now filed.

Now, if you have any exceptions to argue regarding it, Mr. Knudsen, I will hear them.

Mr. Knudsen: If the Court please, the first affirmative defense in the amended answer raises as a defense the alleged failure of libelant to proceed under a provision of the charter party regarding adjustments of charter hire before bringing this action. The respondent takes the position that failure to proceed under that clause of the charter with the contracting officer to ask for increase in charter hire is a condition precedent to this action, much the same as the standard disputes clause would be.

Our position on that is this: That in this case, as was alleged and has been admitted, a claim for additional charter hire was presented to the contracting officer and was denied by him on the ground that he had no authority to decide a claim arising from a breach of contract, and under the authorities that are applicable, such a ruling by the contracting officer waives any defense by the [11] Government based upon provisions of the charter party or conditions preceding, such as going through certain administrative proceedings.

The second objection to the merits of that defense is that the charter provision does not apply to an action for damages for breach of contract on its face. It simply applies to an adjustment of charter hire during the normal period of the charter. We are asking in this case damages for breach of the charter by wrongfully holding the vessel over and beyond the charter term, and we urge——

The Court: It used to be demurrage. Is it anything more than that now?

Mr. Knudsen: That is often the common term, Your Honor.

Therefore, we feel the first affirmative defense is not good in law on its face, and our exception should be sustained.

The Court: The exceptions are overruled, that is without prejudice to renewing the sufficiency of the objections in any proper form, among others, the sufficiency of the proof. It may turn out that the Court might not be convinced that the proof under the law was sufficient, and may be part of the reason for it would be that the law forbids the proof to [12] have any effect as you contend now as a matter of law it has none. The Court may conceivably take that view after hearing all the evidence, but I would rather hear the evidence.

Is there anything else on exceptions you wish to argue?

Mr. Staring: I have nothing further, Your Honor.

The Court: I ask counsel then to proceed. It will be appropriate for counsel on each side at this

stage to make their respective opening statements of what they think the proof will be in this case. I ask counsel not to comment on the evidence in making that opening statement. Merely give a brief narrative form or outline of what you think will be received before the Court in the way of evidence.

(Whereupon, opening statements were made by Mr. Knudsen for the libelant and by Mr. Staring for the respondent.)

The Court: I ask the libelant to proceed with the libelant's case in chief.

Mr. Knudsen: I would like to call as the first witness Mr. H. E. A. Ford. [13]

H. E. A. FORD

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Knudsen:

Q. Will you state your full name and address for the benefit of the reporter?

A. Hubert Edward Arthur Ford.

The Court: What is that?

The Witness: The full name?

The Court: I just want you to repeat what you said. I am not familiar with your dialect yet. What is your name?

The Witness: Hubert Edward Arthur Ford.

The Court: You may proceed.

(Testimony of H. E. A. Ford.)

Q. (By Mr. Knudsen): Your address?

A. 1999 Nelson Street, Vancouver, British Columbia.

The Court: 1909.

The Witness: 1999.

Q. (By Mr. Knudsen): What is your occupation?

A. Shipping executive, specifically secretary of my [14] company.

Q. And what company is that?

A. Western Canada Steamship Company, Limited.

Q. The libellant herein? A. Yes.

Q. Would you briefly outline your present duties with the Western Canada Steamship Company, Limited?

A. Well, as secretary of the company and executive and also director, but principally secretary of the company, I am in charge of all the documents and minutes, keeping of minutes, and other executive matters which may be delegated to me by the Board of Directors in certain instances through the chief executive officer who is the president of the company.

Q. What is the business of the Western Canada Steamship Company, Limited?

A. They are ocean carriers of freight, what you might term common carriers.

Q. Does the company own vessels?

A. Yes.

Q. Specifically, during 1950 and 1951 did it own

(Testimony of H. E. A. Ford.)

the S.S. Lake Sicamous? A. Yes.

Q. And does it charter those vessels?

A. Yes. It charters them from time to time. [15]

Q. Will you briefly explain how those charters are effected, that is to say, by means of what agents and subagents?

A. Well, Western Canada Steamship Company itself does not primarily carry out the negotiations for these charters. These charters or the booking of other cargo on berth terms is effected by general agents of ours, of whom there are four, Anglo-Canadian Shipping Company, Limited, Canada Shipping Company, Limited, Empire Shipping Company, Limited, and North Pacific Shipping Company, Limited.

Q. Was one of those companies the agent of Western Canada Steamship Company with respect to the charter involved in this lawsuit?

A. Yes, the Anglo-Canadian Shipping Company.

Q. And did they employ any subagents in respect to that charter party?

A. Yes, J. H. Winchester & Company.

Q. Where is that? A. In New York.

Mr. Knudsen: Mr. Bailiff, will you have that marked?

(Charter Party of the S.S. Lake Sicamous marked Libelant's Exhibit 1 for Identification.) [16]

Q. (By Mr. Knudsen): Handing you what has been marked for identification as Libelant's Ex-

(Testimony of H. E. A. Ford.)

hibit No. 1. I will ask you if you can identify that document? A. Yes.

Q. What is it?

A. It is a charter party of the Lake Sicamous, and also an amendment to the contract, Revision No. 4 there, Revisions No. 3, 2 and 1.

Mr. Staring: If Your Honor please, the Government would be willing to stipulate that that is the original charter party in effect on the Lake Sicamous.

Mr. Knudsen: Thank you, Mr. Staring.

I offer that in evidence if the Court please.

The Court: It is admitted.

(Libelant's Exhibit 1 received in evidence.)

LIBELANT'S EXHIBIT NO. 1

Article 1. Description of Vessel:

(a) Name: S.S. Lake Sicamous.

(b) Home Port: Vancouver, B. C., Canada.

(c) Classed: A-1 Lloyds.

(d) Engines: Of..... Normal..... Brake, 2500 Shaft, or Indicated H.P., as certified by classification society.

(e) Speed: Capable of maintaining under normal conditions an average sea speed of about 10 knots in moderate weather when fully laden, on an

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

average consumption of 28 tons (of 2240 lbs.) standard grade "C" or equivalent oil fuel per 24 hours.

(f) Net Registered tonnage: 4302.

(g) Deadweight: Deadweight capacity of the Vessel is about 10,750 tons of 2240 lbs., including cargo, bunkers, water and stores on assigned summer mean draft of 27 feet 8¾ inches in salt water corresponding to a load line summer freeboard of 9 feet 9½ inches, under present International Load Line Regulations. The Vessel's load line is marked and so placed as to admit of her being safely loaded to such draft.

(h) Bale cubic capacity for cargo (cubic feet under deck according to ship's plan but not guaranteed by Owner.) 485,000, including deep tanks number (2) in No. 4 Hold.

(i) Amount and location of permanent ballast carried: None.

(j) Bunker capacity in tons of 2240 lbs. Double bottoms & settling tanks, 900 tons; Deep tanks 650 tons.

(k) Number of hatches and size of hatch openings: Five: #1, 33 feet 9 inches x 20 feet 0 inches; #2, 35 feet 0 inches x 20 feet 0 inches; #3, 20 feet 0 inches x 20 feet 0 inches; #4, 35 feet 0 inches x 20 feet 0 inches; #5, 25 feet 0 inches x 20 feet 0

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

inches; Deep Tanks #4 7 feet 3 inches x 4 feet 0 inches.

(l) Number of winches and derricks with capacity of each: 2 winches & 2 derricks at each hatch; #1, 3, 4 & 5: 2 derricks of 5 tons each; #2, 2 derricks of 10 tons each.

(m) Number and location of 'tween decks: One 'tween deck each in all 5 cargo holds.

Article 2. Place and Dates of Delivery and Redelivery, etc.

(a) Place of Delivery: Seattle, Washington.

(b) Date of Delivery: 2 August, 1950.

(c) Cancellation Date: 5 August, 1950.

(d) Redelivery: Any U. S. West Coast Port.

(e) Charter Hire: \$1125.00 per diem.

(f) Fuel on board at time of delivery: Per instructions of DEPCOMSTS, North Pacific.

* * *

Article 5. Period of the Charter.

(a) This Charter shall be for a period of about 120 days from the time of delivery of the Vessel or to the termination of the voyage current at termination date. ~~The Charterer shall have the privilege of continuing this Charter for a second period of~~

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

about 120 days upon giving the Owner or his agent written notice of Charterer's election to continue this Charter, 20 days prior to the expiration of the original period of this Charter.

(b) The Charterer shall have the privilege of terminating this Charter at any time upon giving not less than 20 days notice of termination to the Owner, and redelivery shall be made in accordance with the provisions of Article 27.

* * *

Article 8. Loading and Discharging.

(a) The cargo or cargoes shall be laden and discharged in any dock or at any wharf, place or open roadstead that Charterer may direct, provided the Vessel can lie always safely afloat at any time of tide except at such places where it is customary for similar size vessels to lie safely aground.

(b) The Charterer shall pay all expenses directly connected with the loading and discharging of the cargo including stevedoring, wharfage, checking and tallying, winchmen, heavy lifts, dumping, stowing, securing and trimming, and removal of strong backs with shore equipment where the use of shore equipment is not necessitated by a structural or mechanical defect in the vessel. Unless otherwise provided herein the Charterer shall provide necessary dunnage and shifting boards, also any extra fittings or materials requisite for a spe-

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

cial trade or unusual cargoes, but the owner shall allow the Charterer the use of any dunnage, shifting boards and other fittings or materials already on board the vessel. The Charterer shall have the privilege of using shifting boards for dunnage, but if the vessel's shifting boards are used as dunnage the Charterer shall make good any damage to or shortage of such shifting boards on redelivery of the vessel. If the Charterer elects or is requested by the Owner to remove dunnage and fittings placed on board by the Charterer, the cost of removal and discharge shall be borne by the Charterer.

* * *

(f) Cargo shall be loaded, stowed, trimmed, secured and discharged by the Charterer under the Master's supervision.

* * *

Article 12. Charter Hire.

(a) Except as otherwise provided herein, the Charterer shall pay for the use and hire of the vessel at the rate stated in paragraph (e) of Article 2, per 24 hour day or pro rata part thereof from the time of her delivery to the Charterer in accordance with Article 4 to the time of her redelivery in accordance with Article 27. However, should the Vessel be lost or become a constructive total loss under the terms of the American Institute Time Form Marine Hull Policy, hire shall cease at noon of the

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

day of her loss or constructive total loss under the terms of the American Institute Time Form Marine Hull Policy, and if missing hire shall cease at noon of the last day the Vessel was heard from. Charter hire under this subparagraph shall be based on elapsed time measured by Greenwich Mean Time.

* * *

Article 21. Exceptions.

The act of God, enemies, fire, restraint of princes, rulers or people, and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation throughout this Charter Party always mutually excepted. The Vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property, or to go into drydock or into ways with or without cargo on board.

* * *

Article 27. Redelivery.

(a) Unless lost, the Vessel shall be redelivered in accordance with paragraph (d) of Article 2. The Charterer shall give the Owner not less than 20 days written notice of the Vessel's expected date of redelivery and the probable port of redelivery. It shall be the duty of the Owner to minimize his expenses during any period while the Vessel is in port

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

subsequent to the receipt of the notice of redelivery and prior to the actual redelivery, crediting to the Charterer any savings.

* * *

Article 29. Revision of Rate of Hire.

(a) General Revision.

(1) The rate of hire specified in Article 2 may be increased or decreased in accordance with this Article.

(2) Demand for negotiation. At any time subject to the limitations specified in this Article, either the Charterer or the Contractor may deliver to the other a written demand that the parties negotiate to revise the rate of hire under this Charter Party. No such demand shall be made before sixty days after the date of execution of this Charter Party, and thereafter neither party shall make a demand having an effective date within one-hundred-twenty days after the effective date of any prior demand, provided, however, that this limitation shall not apply in any manner to a demand for negotiation on the basis of an "adjustment in wages." A demand for negotiation on the basis of an "adjustment in wages" will not be barred by the time limitations set out above, nor will such a demand operate as a bar, by reason of those time limitations, to a demand for general negotiation. (The term "adjustment in wages" as used in this Article means a change in

(Testimony of H. E. A. Ford.)

Libellant's Exhibit No. 1—(Continued)

the wages, salaries or other terms or conditions of employment of personnel upon the Vessel operated by the Contractor under this Charter Party, which shall be generally applicable to the shipping industry on the coast of the United States from which the Vessel under this Charter customarily operates.) Each demand for negotiation shall specify a date (identical with or subsequent to the date of delivery of the demand) on which any resulting revision of the rate of hire shall be effective. This date is hereinafter referred to as "the effective date of the revision of hire." Any demand made under this Article, if made by the Contractor, shall state briefly the ground or grounds therefor and shall be accompanied by the statements and data referred to in paragraph (3) of this Article. If the demand is made by the Charterer, such statements and data will be furnished by the Contractor within thirty days of the delivery of the demand.

(3) Submission of Data. At the time specified or provided in paragraph (2) of this Article 29(a) the Contractor shall submit: (i) A new estimate and breakdown of the per diem cost and the rate of hire under this Charter Party itemized as far as practicable on the basis used in connection with the original negotiation of this Charter Party. (ii) An explanation of the differences between the original (or last preceding) estimate and the new estimate. (iii) Such relevant operating data, cost records, over-

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

head absorption reports and accounting statements as may be of assistance in determining the accuracy and reliability of the new estimate. (iv) A statement of the experienced costs of operation under this Charter Party to the extent that they are available at the time of negotiating the revision of hire hereunder, and, (v) Any other relevant data usually furnished in negotiating hire for a new Charter Party. The Charterer may make such examination of the Contractor's accounts, records and books as the Contracting Officer may require and make such audit thereof as the Contracting Officer may deem necessary.

(4) Negotiation.

(A) Upon the filing of the statements and data required by paragraph (3) of this Article, the Contractor and the Contracting Officer will negotiate in good faith to agree upon a rate of hire to be effective on the effective date of the revision of hire. Negotiations for revisions of hire under this Article will be conducted on the same basis employing the same types of data, including without limitations, comparative prices, comparative costs and trends thereof, as in negotiating hire for a new Military Sea Transportation Service contract.

(B) After such negotiation the agreement reached will be evidenced by a supplemental agreement to this Charter Party stating the revised rate

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

of hire to be effective on the effective date of the revision of hire (or such other later date as the parties may fix in such supplemental agreement).

(5) Disagreements. If, within thirty days after the date on which the statements and data are required to be filed pursuant to paragraph (2) of this Article (or such further period as may be fixed by written agreement) the Contracting Officer and the Contractor fail to agree to a revised rate of hire, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article 32 (Disputes) and the rate of hire so fixed shall remain in effect for the balance of the Charter Party notwithstanding any other provision of this Article.

(6) Payments. Until the revised rate of hire shall have become effective in accordance with this Article, the rate of hire in force at the time the demand was made for negotiation shall be paid, subject to appropriate later adjustment made pursuant to paragraph (4) or (5) of this Article.

(b) Revision of Hire Upon Change of Wages or Employment Conditions.

(1) The rate of hire specified in Article 2 may be revised in accordance with this Article 29(b). As used in this Article, the term "adjustment in wages" means the same as in Article 29(a).

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

(2) Condition Precedent. If all the following conditions are satisfied the Contracting Officer shall enter into negotiations with the Contractor for the revision of the rate of hire under this contract, but only to the extent set forth in paragraph (3) of this Article 29(b).

(A) The Contractor shall advise the Contracting Officer in writing of any request on behalf of the employees of the Contractor for any adjustment in wages which shall materially affect the costs of performing this contract. This advice shall be given within 20 days after the Contractor shall learn that such request has been made. In the event that the request has been made prior to the execution of this Charter Party and has not been finally acted upon, the written advice of such request shall be given at the time of execution of this Charter Party.

(B) The Contractor, prior to the expiration of 30 days (or such greater period as may be agreed upon in writing within said 30 days) after the date of the collective bargaining agreement, arbitration award or other document evidencing the adjustment in wages, but, in any event, prior to the expiration of one year after the date specified for the expiration of this Charter Party as it may from time to time be amended, shall submit to the Contracting Officer the following: (i) A true copy of the collective bargaining agreement, arbitration award or

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

other document providing for the adjustment in wages. (ii) A written demand that the parties negotiate to revise the rate of hire during a period stated in the demand. That period shall not commence at a date earlier than the effective date of the adjustment in wages. That period shall not extend beyond the expiration of this Charter Party as it may be from time to time amended. (iii) Estimates of the probable effects of such adjustment in wages upon the Contractor's costs of performing this Charter Party during the period stated in the demand. These estimates shall give due effect to estimates of costs incurred up to the beginning of such period and to the fact that the full effect of such adjustment will not normally be reflected immediately in the cost of performance of this Charter Party. These estimates shall be accompanied by estimates of the effect of such adjustment in wages on the direct and indirect labor costs during the stated period. (iv) Proposed revised rate of hire for this Charter Party during the stated period.

(3) Negotiations. Upon the filing of the estimates and data required by paragraph (2)(b) of this Article 29(b) the Contracting Officer and the Contractor will negotiate promptly in good faith to agree upon revised rate of hire for this Charter Party during the stated period which has been affected by such adjustment in wages. In the negotiation the Contracting Officer and the Contractor in

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

good faith will estimate the effect of such adjustment upon the cost of performance during such period. It is recognized that it will not be practicable to make precise computations of the effect of any such adjustment on the Contractor's costs and, therefore, it is the intention of the parties that negotiation and determination of any revision of the rate of hire under this Article 29(b) shall be on the basis of the estimates of the effect of the adjustment in wages. The rate of hire for the stated period will be revised to reflect, to an extent which is deemed reasonable under all the circumstances, such estimated effect on costs.

(4) Limitation on Revision. The Contractor agrees that it will not request and shall not be entitled to receive a revision of the rate of hire under this Article 29(b) except to the extent that such adjustment in wages operates to make the rate of hire under this Charter Party less than a fair and reasonable one under all the circumstances. In no event shall any such revision exceed the amount of the estimated effect of such adjustment in wages on the Contractor's costs hereunder during the stated period specified in the written demand mentioned in subparagraph (2)b(ii) of this Article 29(b).

(5) Supplemental Agreement. Any agreement entered into under this Article 29(b) will be incorporated in a supplemental agreement to this Charter Party which shall be subject to the written ap-

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

proval of the Contract Clearance Board, Office of Navy Materials, and shall state (a) the revised rate of hire to be in effect during a specified period to be set forth in such agreement, and (b) the method of adjusting the payments therefor.

(6) Disagreements. If within 30 days after the time for filing the estimates and data required by paragraph (2)b of this Article 29(b) (or such further period as may be fixed by written agreement) the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article 32 (Disputes).

* * *

Article 32. Disputes.

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail, or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals

(Testimony of H. E. A. Ford.)

Libelant's Exhibit No. 1—(Continued)

shall be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the Contract and in accordance with the Contracting Officer's decision.

* * *

Admitted in evidence August 3, 1955.

Mr. Knudsen: Will you have this marked, Mr. Bailiff?

The Clerk: Libelant's Exhibit 2.

(Official Form No. 19 of the Canada Registry of Shipping marked Libelant's Exhibit No. 2 for Identification.) [17]

The Court: Are you able to stipulate with counsel on that?

Mr. Staring: Yes. We would be pleased to stipulate that this is a correct copy of the transcript of register of the Lake Sicamous.

The Court: What do you call it, Mr. Knudsen? Have you a more accurate designation of its nature in the form of a name that will reflect its meaning?

(Testimony of H. E. A. Ford.)

Mr. Knudsen: Yes, Your Honor. This is Official Form No. 19 of the Canada Registry of Shipping issued by the Canadian Department of Transport. It is entitled "A Transcript of Register for Transmission to Registrar General of Shipping and Seamen." It is a document that gives the particulars of the vessel, her official number, and the various details concerning her.

The Court: Well, is it not a certified copy of the official register of this vessel?

Mr. Knudsen: Yes, it is, Your Honor, and I offer it in evidence.

The Court: It is admitted.

(Libelant's Exhibit No. 2 received in evidence.) [18]

The Court: I ask counsel in each instance, if you think you can do it without objection from opposing counsel, to give the document a name which you believe—one word if possible—which you believe reasonably reflects the nature of the information contained in the document or in the exhibit in each instance.

Mr. Knudsen: Thank you, Your Honor.

The Clerk: Libelant's Exhibit 3.

(Delivery certificate and redelivery certificate marked Libelant's Exhibit 3 for identification.)

The Court: Mr. Knudsen, how many of these documents has opposing counsel seen, if you know?

(Testimony of H. E. A. Ford.)

Mr. Knudsen: I don't know what his files contain, your Honor, but I assume his file contains counterpart originals of all of these documents.

The Court: I wish you would bring out all of the documents you expect to offer through this witness and let counsel see them, every one of them. They do not have to have the Clerk's marks on them at this time.

Mr. Staring: Your Honor, I am prepared to stipulate that the delivery and redelivery certificate—— [19]

The Court: Which has been marked Libelant's Exhibit 3—Mr. Knudsen, do you care to look at it and give it a name?

Mr. Knudsen: Your Honor, Libelant's Exhibit 3 is the delivery certificate of the vessel to the United States by the libelant and the redelivery of the vessel by the United States to the libelant. It is delivery certificate and redelivery certificate, and I offer the same in evidence.

The Court: It is now admitted.

(Libelant's Exhibit No. 3 received in evidence.)

The Court: I wish I had time to have pre-trial procedures in all these cases. Our future ambition is to provide that in every case that has any exhibits or is expected to have.

Mr. Knudsen, you might assist counsel if you would step to counsel table near him and assist him in identifying the papers that you expect to use.

(Testimony of H. E. A. Ford.)

(Mr. Knudsen and Mr. Staring confer at counsel table.)

The Clerk: Libelant's Exhibits 4, 5 and 6.

(Copy of letter from Commander [20] Carl to J. A. Winchester & Co., November 19, 1950, marked Libelant's Exhibit No. 4 for identification.)

(Request for notice of claim marked Libelant's Exhibit No. 5 for identification.)

(Notice of claim marked Libelant's Exhibit No. 6 for identification.)

Mr. Knudsen: If the Court please, Libelant's Exhibit 4 is a letter—it is a copy of a letter from Commander Carl, the contracting officer, to J. A. Winchester & Co. in New York, agent of the libelant, giving notice of redelivery. It is dated November 19, 1950, I believe.

The Court: Repeat.

Mr. Knudsen: It is November 19, 1950. I am not quite positive of that date.

The Clerk: It is December.

Mr. Staring: There is no objection to it being received in evidence.

The Court: Will you wait just a moment?

Will you read Mr. Knudsen's statement?

(Whereupon, the court reporter read as follows: "It is November 19, 1950. I am not quite positive [21] of that date.")

(Testimony of H. E. A. Ford.)

The Court: What I am interested in is not the details of from and to whom as I am the nature of it, which is encompassed in the last two words I think in Mr. Knudsen's statement. I do not have the time to write all those things down. I just want a name for the paper so in the future when it is mentioned the Court will be reminded and can more easily physically obtain access to the particular exhibit.

Mr. Knudsen: Yes, your Honor. I appreciate that.

The Clerk: Libelant's Exhibits Nos. 7, 8, 9, 10, 11 and 12 are marked.

(Rejection of voucher by Commander Carl marked Libelant's Exhibit No. 7 for identification.)

(Denial of authority over claim by contracting officer marked Libelant's Exhibit No. 8 for identification.)

(Advice of transfer of claim to the Comptroller General or General Accounting Office marked Libelant's Exhibit No. 9 for identification.)

(Recommendation regarding claim marked Libelant's Exhibit No. 10 for [22] identification.)

(Advice re status of the claim marked Libelant's Exhibit No. 11 for identification.)

(Testimony of H. E. A. Ford.)

(Denial of claim marked Libelant's Exhibit No. 12 for identification.)

The Court: Now, what is No. 5, if you know?

Mr. Knudsen: No. 5, if the Court please, is a letter from libelant to J. A. Winchester & Co. requesting that that agent give notice to the Government that libelant will claim increase in charter hire, and I might say that it might be denominated "request for notice of claim."

The Court: Request for notice of claim?

Mr. Knudsen: Yes.

Libelant's Exhibit 6 might be denominated the notice of claim which was forwarded by J. A. Winchester to Commander Carl, the contracting officer.

The Court: And 7?

Mr. Knudsen: Libelant's 7 is a rejection of voucher by Commander Carl.

The Court: It would not be rejection of claim or notice of claim, would it?

Mr. Knudsen: Well, you have me at a disadvantage now. I am not sure of the sequence. [23]

The Court: What is it? Reject of what?

Mr. Knudsen: I believe it is rejection of voucher, but I can't state for sure.

The Court: Let counsel see the exhibit.

(Whereupon Libelant's Exhibit 7 is shown to Mr. Knudsen by the Bailiff.)

Mr. Knudsen: Well, Exhibit 7, your Honor, was rejection of voucher.

(Testimony of H. E. A. Ford.)

The Court: Yes, that is what you said. Do you still believe that?

Mr. Knudsen: Yes, your Honor, and Exhibit 8 is a denial of authority over claim by the contracting officer.

The Court: The next one.

Mr. Knudsen: Exhibit 9 is advice of transfer of claim.

The Court: Advice as to transfer of claim?

Mr. Knudsen: To the general accounting office.

The Court: Transfer of claim to General Accounting.

Mr. Knudsen: Comptroller General or General Accounting Office, if the Court please.

The Court: The next one.

Mr. Knudsen: No. 10 is a recommendation regarding the claim.

The Court: From whom is that [24] recommendation?

Mr. Knudsen: They have "Accounts Office" to the General Accounting Office.

No. 11 is merely an advice regarding the status of the claim.

The Court: Merely what?

Mr. Knudsen: Advice re the status of the claim.

No. 12 is a denial of the claim.

The Court: Mr. Staring, if you have not already, will you kindly now look at each of these exhibits and see if you wish to give counsel the benefit of any attitude you may have?

(Testimony of H. E. A. Ford.)

Mr. Staring: I have looked at them, your Honor, and won't need to do so again.

The Court: Very well.

Mr. Knudsen, do you believe you are now prepared to make offer of them or do you think by reason of things you know about them you had better offer proof? You see I need to have an expression from somebody as to whether or not these matters can be gotten into evidence without further proof, something that can be appropriately said to evince that information.

Mr. Knudsen: Your Honor, I offer these exhibits in evidence.

The Court: Is there any objection to them?

Mr. Staring: If your Honor please—— [25]

The Court: State your attitude as to No. 4. Is there any objection to that?

Mr. Staring: No objection.

The Court: No. 4 is admitted.

(Libelant's Exhibit No. 4 received in evidence.)

LIBELANT'S EXHIBIT NO. 4

Department of the Navy, Military Sea Transportation Service, Washington 25, D. C.

In Reply Refer to:

MSTS-314C/hrg

L4-3

Ser 15075M3

(Testimony of H. E. A. Ford.)

Western Canada Steamship Company, Ltd.
c/o J. H. Winchester and Company, Inc.,
19 Rector Street,
New York 6, New York.

Gentlemen :

This will confirm notice of cancellation of the SS Lake Sicamous time charter contract MST-197 given your broker J. H. Winchester and Company, Inc., by telephone 1135 hours 13 November, 1950.

The SS Lake Sicamous will be redelivered to owner upon termination of current voyage in Seattle, Washington.

You are advised that all action incident to the redelivery of the vessel at Seattle should be coordinated with the Deputy Commander, Military Sea Transportation Service, North Pacific, Pier 37, Seattle 4, Washington who, by copy of this letter, is being requested to effect redelivery of the SS Lake Sicamous.

Sincerely yours,

R. A. CARL,
LCDR, SC, USN, Contracting
Officer.

Copy to: Deputy Commander, MSTs, North Pacific.

Admitted in evidence August 3, 1955.

(Testimony of H. E. A. Ford.)

The Court: No. 5, any objection to that?

Mr. Staring: I would object to No. 5 on the ground of materiality.

The Court: Then the Court will hear proof.

Any objection to No. 6?

Mr. Staring: No objection to No. 6.

The Court: Admitted.

(Libelant's Exhibit No. 6 received in evidence.)

LIBELANT'S EXHIBIT NO. 6

[Letterhead]

J. H. Winchester & Co.

Established 1866

Steamship Agents and Brokers

19 Rector Street,

New York 6, N. Y.

January 19, 1951.

Department of the Navy,

Military Sea Transport Service (314 Code)

Main Navy Building—Room 1212

Washington 25, D. C.

Gentlemen:

Re: S.S. "Lake Sicamous"

Time Charter dated July 7/50

Contract #MST-197

(Testimony of H. E. A. Ford.)

We quote letter received from Western Canada Steamship Company, Limited. Owners of the above vessel, under date of January 17th which is self-explanatory:

“We have to advise you that, as the above named vessel is being retained on charter for about six monthths by the M. S. T. S., we desire you to give them notice that it is our intention to claim an increase in the per diem hire figure of \$1125.00 for the period in excess of 120 days due to the higher Time Charter rates paid subsequent to the expiration of the 120 day charter period. the increase to be agreed upon at a later date.”

Very truly yours,

/s/ J. H. WINCHESTER & CO.,

REB/ge

CC: Western Canada Steamship Co., Ltd.

[Stamped]: Received Jan. 22. 1951. Western Canada S.S. Co.

/s/ J. S. C.

Admitted in evidence August 3, 1955.

The Court: No. 7, any objection to that?

Mr. Staring: No objection to 7.

The Court: Admitted.

(Testimony of H. E. A. Ford.)

(Libelant's Exhibit No. 7 received in evidence.)

LIBELANT'S EXHIBIT NO. 7

Department of the Navy, Military Sea Transportation Service, Washington 25, D. C.

In Reply Refer to:

MSTS—314C2/ad

L6

Ser 7679M3

23 April, 1951.

Western Canada Steamship Co., Ltd.,

1130 Marine Building,

Vancouver, B. C., Canada.

Gentlemen:

We have reviewed your Invoice No 2-17, the Final Hire invoice for SS Lake Sicamous. It is to be noted that you charged the Military Sea Transportation Service for 75 days 13 hours at the rate of \$1,666.67 which is a rate which is not in accordance with the contract agreement.

Your Invoice is being returned herewith.

Sincerely your,

/s/ R. A. CARL,

LCDR, SC, USN, Contracting Officer,

(Testimony of H. E. A. Ford.)

Encl: Invoice No. 2-17.

[Stamped]: Received April 30, 1951, Western
Canada S.S. Co.

/s/ W. S.

Admitted in evidence August 3, 1955.

The Court: Any objection to No. 8?

Mr. Staring: No objection. [26].

The Court: Admitted.

(Libelant's Exhibit No. 8 received in evidence.)

LIBELANT'S EXHIBIT NO. 8

Department of the Navy, Military Sea Transportation
Service, Washington 25, D. C.

In Reply Refer to:

MSTS—341C1/wab

Ser 15098M3

2 July 1951

Air Mail—Special Delivery

Western Canada Steamship Company Limited,
1130 Marine Building,
Vancouver, Canada.

Attention: Mr. W. Sedgwick
S.S. Lake Sicamous

Gentlemen:

Reference is made to your letter of May 3, 1951,
in which you urged reconsideration of your
claim for additional charter hire in the amount of

(Testimony of H. E. A. Ford.)

\$40,918.65 representing damages which you feel are owed to your company by the Government, presumably on the theory that the charter was breached by the Government.

As you have been previously advised, Military Sea Transportation Service is of the opinion that you have been compensated at the agreed rate of hire for the period during which the Government has had the use of your vessel in accordance with the terms of the charter party. However, since you apparently feel that you are entitled to \$40,918.65 as additional charter hire resulting from a breach of the charter, you are advised that the settling of such a claim for unliquidated damages arising out of breach of contract is not within the authority of Military Sea Transportation Service, but must be considered by the Comptroller General of the United States. In the event you decide to submit a claim for unliquidated damages to that officer, it should be addressed to the Comptroller General of the United States, General Accounting Office, Washington, D. C.

Sincerely yours,

/s/ R. A. CARL,

LCDR, SC, USN, Contract-
ing Officer.

Encl: Invoice No. 2-17

[Stamped]: Received Western Canada SS. Co.
/s/ J. S. C.

Admitted in evidence August 3, 1955.

(Testimony of H. E. A. Ford.)

The Court: Any objection to No. 9?

Mr. Staring: I think it is immaterial, your Honor, but we will stipulate that it may be admitted.

The Court: It is admitted.

(Libelant's Exhibit No. 9 received in evidence.)

LIBELANT'S EXHIBIT NO. 9

General Accounting Office
Washington 25

Claims Division

In reply please quote

Cont-Z 919026—RGZ

May 20, 1952.

Western Canada Steamship Company Limited,
Marine Building,
Vancouver, Canada.

Attn: J. S. Clarke, General Manager

Gentlemen:

Receipt is acknowledged of your letter dated April 28, 1952, with enclosure, relative to your claim in the sum of \$40,919.65, for additional hire for the vessel "Lake Sicamous."

Under date of January 18, 1952, in response to your letter of December 28, 1952, this Office advised you as follows:

(Testimony of H. E. A. Ford.)

“You are advised that the matter has been referred to the administrative office involved for examination and report pending receipt of which no action may be taken by this Office. When the report is received, however, further consideration will be given your claim and you will be advised as to the action taken thereon.”

This Office is still awaiting receipt of the information requested from the Department of the Navy. Immediately upon receipt of the necessary report, the matter will be accorded prompt attention.

Very truly yours,

K. L. GAYLOR,
Chief of Section,

By /s/ C. K. ARNOLD.

Received May 26, 1952.

Admitted in evidence August 3, 1955.

The Court: No. 10?

Mr. staring: No objection to 10.

The Court: Admitted.

(Libelant's Exhibit No. 10 received in evidence.)

(Testimony of H. E. A. Ford.)

LIBELANT'S EXHIBIT No. 10

U. S. Navy Regional Accounts Office
1331 U Street Northwest
Washington 25, D. C.

In Reply Refer to
FR-10 (MK:ms)
L6-2(MST-197)
Voucher No. 134633

30 June, 1952.

General Accounting Office,
Claims Division,
Washington 25, D. C.

Subj: Claim of Western Canada Steamship Com-
pany, Ltd., Marine Building, Vancouver,
Canada.

Date: 28 December, 1951.

Amount: \$40,918.65.

Appropriation: 1711990.01 NMF 1951 039 19961
Allot 30000.

Ref: (a) BuSandA Manual, par. 56205-7 (IM 21-1)
(b) GAC ltr dtd 1-18-52, file Cont-Z-919026-
RGZ.

Encl: (1) Above noted claim, contract MST-197.
(2) MSTs ltr dtd 5-28-52, file MSTs-
712/hrq (CN-28), Ser 11414M7 with three
attachments.

(Testimony of H. E. A. Ford.)

Sirs:

The enclosed claim has been given an administrative examination and is returned to the General Accounting Office for settlement, in accordance with reference (a).

This claim is a request for payment of additional charter hire under contract MST-197, due to alleged unnecessary delay in redelivery of the S.S. Lake Sicamous to the owner. The owner contends that the vessel was time chartered to the Navy on 4 August, 1950, at a stipulated charter rate of \$1,125.00 per diem for a period of 120 days, but redelivery was not effected until 12 February, 1951, after a total of 195 days and 13 hours. The owner has submitted invoice number 2-17 for payment of the sum of \$40,918.65 which represents the difference between the charter rate of \$1,125.00 per diem as provided by contract MST-197 and the sum of \$1,666.67 alleged by the contractor to be the prevailing market rate for 75 days and 13 hours by which the charter period exceeded 120 days. Disbursing data will be furnished under separate cover. Payment of the claim has not been and will not be made by a disbursing officer of the Navy.

This office concurs in the opinion of the contracting officer that the contract does not provide for additional hire and the claimant received payment in full for the entire period of the use of his vessel. Since the claim was previously disallowed by the

(Testimony of H. E. A. Ford.)

contracting officer, favorable consideration of the claim is not recommended.

It is requested that the above-noted voucher number together with the appropriation and all accounting data shown, be transcribed to the certificate of settlement.

Respectfully,

J. A. WASSON,

Ensign (SC), USN, Director, Accounts Receivable
and Claims Division, by Direction of the Officer
in Charge.

[Stamped]: This claim is no longer under the jurisdiction of the Navy Department. Therefore any inquiries relative to the probable date of settlement should be addressed direct to the claims Division of the General Accounting Office, Washington 25, D. C., making reference to Navy claim voucher noted above.

Copy to:

Contr.

[Stamped]: Received July 7, 1952, Western
Canada S.S. Co.

/s/ W. S.

Received July 7, 1952.

Admitted in evidence August 3, 1955.

(Testimony of H. E. A. Ford.)

The Court: No. 11?

Mr. Staring: No objection to 11.

The Court: Admitted.

(Libelant's Exhibit No. 11 received in evidence.)

LIBELANT'S EXHIBIT No. 11

General Accounting Office
Washington 25

August 8, 1952.

Claims Division

In Reply Please Quote

Cont-Z 919026-RGZ

Western Canada Steamship Company, Limited,
Marine Building,
Vancouver, Canada.

Attn: Mr. J. S. Clarke, General Manager.

Gentlemen:

Reference is made to your letter of July 24, 1952, concerning your claim for \$40,918.65, representing an additional amount alleged to be due on account of unnecessary delay in redelivery of S.S. Lake Sicamous by the Department of the Navy under charter hire pursuant to contract No. MST-197.

The matter is receiving consideration in this Office and you will be informed at an early date as to the final action taken.

(Testimony of H. E. A. Ford.)

Very truly yours,

K. L. GAYLOR,

Chief of Section;

By /s/ C. K. ARNOLD.

Received August 13, 1952.

Admitted in evidence August 3, 1955.

[Stamped]: Received August 13, 1952, Western
Canada S.S. Co.

/s/ W. S.

The Court: No. 12?

Mr. Staring: No objection.

The Court: Admitted. [27]

(Libelant's Exhibit No. 12 received in evidence.)

LIBELANT'S EXHIBIT No. 12

Settlement Certificate
General Accounting Office
Washington 25, D. C.

In correspondence
please refer to:

Division: Claims.

Claim No.: Z 919026.

Western Canada Steamship Company, Limited,
Marine Building,
Vancouver, Canada.

(Testimony of H. E. A. Ford.)

Gentlemen:

Your claim for \$40,918.65 representing the amount alleged to be due for unliquidated damages arising out of an alleged breach of contract because of unnecessary delay in redelivery of S.S. Lake Sicamous by the Department of the Navy in connection with a charter hire under contract No. MST-197, dated July 26, 1950, has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.

The records disclose that the subject contract provided for the charter hire of the vessel for approximately 120 days or for a period terminating with the voyage current at the end of the 120-day period. When the first voyage was completed only 65 days of the estimated charter period had been used. When voyage number two was undertaken there remained 49 days of the 120-day charter period. The record also discloses that you made no protest at that time concerning the matter even though you knew that under normal conditions the voyage would extend the time of use beyond the 120-day period; that voyage number two in fact took about 121 days or about 23 days longer than what might be construed as reasonable, although this prolonged period could not have been anticipated. However, the prolongation was caused by war conditions and exigencies of the War which the Government could not anticipate when the vessel was dispatched on voyage number two.

(Testimony of H. E. A. Ford.)

Article 29 of the contract provisions provided a method for the increasing or decreasing charter hire within the period of the contract, which consisted of filing a clearance and the submission of any supporting data; that any disagreement on a demand for a revised rate of hire that was deemed to be a disagreement as to a question of fact, could have been disposed of in accordance with Article 32 of the charter.

Accordingly, the claim for unliquidated damages arising out of an alleged breach of contract, must be denied, as it is well settled that no adjustment nor payment from appropriated funds may be made in the absence of specific provision therefor.

I therefore certify that no balance is found due you from the United States.

Respectfully,

LINDSAY C. WARREN,
Comptroller General of the
United States;

By /s/ W. J. McCARTHY.

[Stamped]: Received November 7, 1952, Western Canada S.S. Co.—J.S.C.

Admitted in evidence August 3, 1955.

(Testimony of H. E. A. Ford.)

The Court: Now, Mr. Knudsen, do you think by your advising with counsel you could obviate the objection to No. 5 or do you think you had better proceed with the proof?

Mr. Knudsen: May I consult with counsel?

The Court: Yes, you may. At this time we will take about a five-minute recess.

(Recess.)

Mr. Knudsen: If the Court please, counsel have stipulated that Libelant's Exhibit 5 may be admitted for the purpose of showing the authority of J. A. Winchester & Co. to give notice of claim to the contracting officer, and that they were acting in their capacity as agent for libelant in so giving notice of claim.

The Court: It is the stipulation that it may be received as proof on those questions?

Mr. Knudsen: It is so stipulated, your Honor, and for no other purpose.

The Court: As to whether there is sufficient proof to establish those facts, do you or do you not make an admission?

Mr. Staring: It was not my intention to admit that. [28]

The Court: You agree it may be admitted for the limited purpose of being evidence on those questions, is that right?

Mr. Staring: That is right.

The Court: Will you read those conditions?

(Testimony of H. E. A. Ford.)

(Whereupon, the court reporter read the statement made by Mr. Knudsen as follows: "If the Court please, counsel have stipulated that Libelant's Exhibit 5 may be admitted for the purpose of showing the authority of J. A. Winchester & Co. to give notice of claim to the contracting officer, and that they were acting in their capacity as agent for libelant in so giving notice of claim.")

The Court: With the amendment contained in Mr. Staring's answers to the Court's question, the Court does now admit Libelant's Exhibit 5 restricted, however, in its evidentiary effect to the question of the authority of Winchester & Co. in respect to the matters and things in this libel mentioned.

(Libelant's Exhibit 5 received in evidence.)

LIBELANT'S EXHIBIT No. 5

(Copy)

January 17, 1951.

Messrs. J. H. Winchester & Co., Inc.,
19 Rector Street,
New York, N. Y.,
U.S.A.

Re: S.S. "Lake Sicamous"
Time Charter dated July 7/50
Contract No. MST-197.

(Testimony of H. E. A. Ford.)

Dear Sirs:

We have to advise you that, as the above-named vessel is being retained on charter for about six months by the M.S.T.S., we desire you to give them notice that it is our intention to claim an increase in the per diem hire figure of \$1,125.00 for the period in excess of 120 days due to the higher Time Charter rates paid subsequent to the expiration of the 120-day charter period, the increase to be agreed upon at a later date.

Yours very truly,

WESTERN CANADA STEAM-
SHIP COMPANY, LIMITED.

JOHN ROSENE,
President.

JR:elc

Admitted in evidence August 3, 1955.

Mr. Knudsen: Thank you, your Honor.

Mr. Bailiff, will you hand Libelant's No. 5 to the witness, please?

(Whereupon, Libelant's Exhibit No. 5 is [29]
handed to the witness.)

Q. (By Mr. Knudsen): Mr. Ford, referring to Libelant's Exhibit No. 5, will you state what that letter is?

(Testimony of H. E. A. Ford.)

A. It is a letter written by the then president of the company to J. A. Winchester & Co. authorizing them to claim extra hire in view of the vessel being kept longer than the charter period of about 120 days.

Q. And what was the purpose of that letter?

A. The purpose of that letter was to put the contracting officer on notice.

Q. Well, specifically, what was the purpose of sending this letter to J. A. Winchester & Co.?

A. J. A. Winchester had negotiated the charter with the Anglo-Canadian, and the purpose was the same procedure to be followed, that the notice of claim for extra hire go through them rather than direct.

The Court: You are now speaking of Libelant's Exhibit 5, are you?

The Witness: Exhibit 5, yes, sir.

Q. (By Mr. Knudsen): And in so acting, was J. A. Winchester & Co. acting as the agent of Western Canada Steamship Company? A. Yes.

Q. And were they authorized so to act? [30]

A. Yes.

Mr. Knudsen: Mr. Bailiff, will you hand the witness Exhibit No. 6?

(Whereupon, Libelant's Exhibit No. 6 is handed to the witness.)

Mr. Knudsen: If the Court please, we have demanded that the Government produce the original of Libelant's Exhibit No. 6, and I believe that that

(Testimony of H. E. A. Ford.)

is available. I believe we can obviate the necessity of having two exhibits in if Mr. Staring will stipulate that the Government received Libelant's Exhibit 6.

Mr. Staring: It is so stipulated.

Mr. Knudsen: That obviates the necessity of discussing that particular exhibit.

Q. (By Mr. Knudsen): Mr. Ford, will you explain your background and qualifications in the operations of a shipping company, particularly with reference to chartering vessels?

A. Well, normally, in an integrated business where all the operations of a shipping company are carried out together—by that I mean the operating side of it and also the cargo-booking side is all carried on in the one office. There, of course, each department has its own functions. The cargo department you might term does the booking of cargoes. That may be on various bases. It may be on [31] berth terms, may be on voyage-chartered terms, may be on time charter terms.

Q. I don't wish to cut you short, Mr. Ford, but what I am interested in is your own personal experience in these matters, your background and qualifications.

A. Well, my background goes back to the inception of my career in 1919 in shipping in India for seven years, and then I went to Borneo Company, Limited, in Siam, with whom I was for sixteen years approximately.

Q. In what capacity did you act there?

(Testimony of H. E. A. Ford.)

A. About fourteen and one-half of those were served as manager of their shipping and insurance department, sometimes separately; for a period of about four years I managed both together. At that time we were agents, the company, the Borneo Company, were agents for several shipping companies of worldwide fame, and the Borneo Company also had their own line of vessels running between India and Siam, which were charter vessels which we took on time charter, mostly from Norwegian owners.

Q. Are you familiar with the charter market for vessels of the same type as the S.S. Lake Sicamous, specifically the time charter market for such vessels during the months of November and December, 1950. and January and February of 1951?

A. Well, familiar to the extent that as an [32] officer of the company any charters we make go over my desk, as an officer and secretary of the Company; also that I keep myself up to date on the position of the market by reading various technical magazines dealing with shipping; also what you might term news letters put out by certain brokers on a weekly or a monthly basis.

Q. Are these normal commercial journals circulated among the trade? A. Yes.

Q. Would you explain what the trend of the charter market was at that time with respect to rates?

A. The trend was definitely upward with very much pressure on the market in view of the Korean hostilities.

(Testimony of H. E. A. Ford.)

Q. Was that due generally to a shortage of vessels available for chartering?

A. That is what it was turning out to be.

Q. Did Western Canada Steamship Company charter any vessels during the month of January, 1951?

A. They chartered two vessels. When I say "chartered," they took on charter two vessels.

May I interpose a question? Do you mean did we take on charter or did we charter to other people?

Q. Were you a party to any charter? Was the company a party to any type of time charter during that period?

A. We were party to two time charters. [33]

The Court: On either end of the charter agreement, is that what you mean?

Mr. Knudsen: Yes, your Honor.

Q. (By Mr. Knudsen): Now, with respect to those transactions, was the company the charterer or the owner? A. The charterer.

The Court: Well, there is chance for me to misunderstand. Did you transfer to somebody else the right to use a vessel or did somebody else transfer to you the right to use a vessel?

The Witness: Somebody else transferred to us the right to use a vessel.

Q. (By Mr. Knudsen): What type of vessels were they?

A. One I definitely looked up is a Liberty-type

(Testimony of H. E. A. Ford.)

vessel. The other I believe to be a Liberty-type vessel, also.

Q. Is that the same type as the S.S. Lake Sicamous?

A. Similar in carrying capacity and speed.

The Clerk: Libelant's Exhibit No. 13.

(Cimon charter marked Libelant's Exhibit No. 13 for identification.) [34]

The Court: I understood that previously the Court asked that all papers that counsel intended to use as a part of the libelant's case be exhibited to opposing counsel.

Mr. Knudsen: I did, your Honor.

The Court: Very well.

Mr. Knudsen: This might be denominated the Cimon charter. Counsel has never had any access to this except just a few minutes ago when he had a chance to examine it.

Mr. Staring: That is correct, your Honor. I have seen the charter, and I will wish to make an objection to its admission upon the grounds of irrelevancy and immateriality if this is the appropriate time for such an objection to be received.

The Court: To whom is that charter——

Mr. Knudsen: It is the charter of the vessel Cimon to the Western Canada Steamship Company, Limited.

The Court: The libelant?

Mr. Knudsen: Yes, your Honor.

The Court: Do you wish opposing counsel to see

(Testimony of H. E. A. Ford.)

it any further? Do you wish the witness to see it or do you wish to proceed?

Mr. Knudsen: I wish to have it identified.

The Court: Do you now offer it? [35]

Mr. Knudsen: I will as soon as I have identified it, if the Court please.

The Court: Did the witness in effect on voir dire say what you said it was?

Mr. Knudsen: He has not as yet.

The Court: Give him an opportunity to do so.

Q. (By Mr. Knudsen): Handing you what has been marked for identification as Libelant's Exhibit 13, Mr. Ford, will you identify that document?

A. Yes. This document is a charter entered into between Campania de Navigacion San Leonardo, S. A., and Western Canada Steamship Company, Limited.

Q. What was the date of the charter?

A. 10 January, 1951.

Mr. Knudsen: I offer that charter in evidence.

The Court: For what purpose do you offer it?

Mr. Knudsen: For the purpose of showing the market rate of charter hire during the month of January, 1951.

Mr. Staring: I will object to it, your Honor.

The Court: The objection is sustained.

You ought to have some witness that knows that subject somewhere.

Mr. Knudsen: If the Court please, evidence of actual charters entered into in this period is the [36] best evidence.

(Testimony of H. E. A. Ford.)

The Court: I will have to hear your authorities before ruling on it.

Mr. Knudsen: I would like to reserve the opportunity to present such authorities to the Court.

The Court: The reasons, the backgrounds, identity of covenants in the offered exhibit may be in part unlike or in whole unlike the contract in litigation.

Mr. Knudsen: If the Court please, I will offer to prove by Mr. Ford that the contents and the covenants of this time charter are substantially the same as that of the——

The Court: Was the United States a party to it?

Mr. Knudsen: No, your Honor.

The Court: The objection is sustained.

Proceed.

Q. (By Mr. Knudsen): Mr. Ford, based upon your experience in chartering vessels during the month of January, 1951, and based upon your past experience in the business of chartering and managing vessels, and based upon your knowledge of market conditions through usual and customary trade channels, do you have an opinion as to the market rate of charter hire for a vessel similar in capacity, in dead weight tonnage capacity, and speed as the S.S. Lake Sicamous? [37]

I am asking now if you have an opinion.

A. For what period, may I ask?

Q. During the month of January, 1951.

A. Not beyond what our own company chartered at that time without having to go back over the records. I couldn't say offhand, but——

(Testimony of H. E. A. Ford.)

The Court: Wait just a moment. You are not going to give an answer to what it was in the "but" clause that you are commencing to state. I ask the witness to pause until counsel can ask him another question.

Q. (By Mr. Knudsen): Mr. Ford, do you have an opinion as to that market rate of charter hire based upon your actual experience in chartering vessels during that period? A. Yes.

Q. May I ask what that is?

The Court: Wait just a moment. Don't make answer yet—not until after the question is stated in full and until after opposing——

Q. (By Mr. Knudsen): I now ask what that opinion is?

Mr. Staring: I will object to that question as irrelevant and immaterial, as not pertaining to any date or period in issue in this case, your Honor.

The Court: Well, the objection is sustained [38] on general grounds. You are going to have to prove generally that the witness has knowledge as an expert during the time mentioned in the question and it cannot be confined to his own dealings with his own ships. That is evidence, but it is not sufficient against the objections of opposing counsel.

Mr. Knudsen: If the Court please, I would like to make an offer of proof.

The Court: You may do that now.

Mr. Knudsen: I will offer to prove by this witness that libellant during the month of January, 1951, entered into two separate time charters with respect to vessels of the same type as the S.S. Lake

(Testimony of H. E. A. Ford.)

Sicamous, that is to say, they are generally American Liberty-type vessels, and that the charter rate provided for in those charters was \$35.00 per dead weight ton, which, when applied to the dead weight tonnage, that is of the Lake Sicamous, would yield a per diem charter rate of \$1,792.00 per day.

I will further offer to prove by this witness that both of those charter parties called for delivery of the vessel at a later date, in one case during the month of February, and in one case during the month of March, and that had the vessels been capable and ready for delivery during the month of January a premium of at [39] least 25c per dead weight ton could have been obtained which would mean \$5.25 per dead weight ton, which when applied to the dead weight tonnage of the S.S. Lake Sicamous would yield a per diem rate of \$1,881.00 per day.

I will further——

The Court: I think you had better wait.

I wish you to have an opportunity to state in the record your attitude, Mr. Staring and do so promptly.

Mr. Staring: Yes, your Honor. We would object to such proof inasmuch as the issues in this case concern a period which began undoubtedly on August 4, 1950, and libelant contends ran for 120 days, which would be approximately four months, or until December 4, 1950; that the market on January 10 and thereafter, the market in February or March

(Testimony of H. E. A. Ford.)

of 1951 would be quite irrelevant and immaterial and outside the issue.

The Court: The Court takes this offer and objection thereto under advisement and will permit counsel this afternoon to resume his offer, and the Court asks the witness to remain in attendance upon the Court in the course of this trial unless and until the Court otherwise orders.

You may step aside now.

(Witness excused.) [40]

(At 12:00 o'clock noon, Wednesday, August 3, 1955, proceedings recessed until 2:00 o'clock p.m., Wednesday, August 3, 1955.)

August 3, 1955—2:00 P.M.

The Court: I ask the witness to resume the stand and we will proceed.

(Witness resumed the stand.)

Mr. Knudsen: If the Court please, may the reporter read the beginning of the offer of proof?

The Court: That will be done.

(Whereupon, the court reporter read into the record the offer of proof made by Mr. Knudsen prior to the noon recess.)

Mr. Knudsen: For the record, if the Court please, I would like to complete that offer of proof by adding that each of the two separate charters referred to——

(Testimony of H. E. A. Ford.)

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(Testimony of H. E. A. Ford.)

The Court: By adding that the witness would testify?

Mr. Knudsen: That is correct, your Honor. By adding that the witness would testify that each of the two separate time charters referred to contain substantially identical—strike that—contain terms and [41] conditions substantially identical to those contained in MST 197, the charter party here involved in this case.

For the purpose of the record, if the Court please, I would like to have the second time charter referred to marked for identification so that it will appear in the record.

The Court: Let counsel see what you have just now referred to as the second time charter.

The Clerk: It will be marked Libelant's Exhibit 14.

(Nora Charter to Western Canada Steamship Co. marked Libelant's Exhibit No. 14 for identification.)

Mr. Knudsen: That may be referred to, if the Court please, as the Nora charter.

The Court: Nora charter to whom?

Mr. Knudsen: To Western Canada Steamship Company.

The Court: To the libelant, is that correct?

Mr. Knudsen: That is correct, your Honor.

The Court: And the name of the vessel identified in Libelant's Exhibit 9 is—repeating—what, please?

(Testimony of H. E. A. Ford.)

Mr. Knudsen: I believe the Court is referring to Libelant's Exhibit 13. The Cimon charter.

The Court: Is your offer of proof now completely [42] stated?

Mr. Knudsen: With the exception of having the witness simply identify this charter, if the Court please.

The Court: Do you have any objection to the offer?

Mr. Staring: I have no objection. Well, I make the same objection as was made before, your Honor, to the reception.

The Court: The Court reserves ruling on the entire offer of proof and I ask counsel to advise the Court further about the authorities relating to it before the Court finally rules upon it. I will permit, however, Mr. Knudsen to ask the usual authenticating questions to try to authenticate this Plaintiff's Exhibit 14 for admission in evidence in case the Court should hereafter rule favorably upon the offer. The questions concerning the proper authentication of Plaintiff's Exhibit 14 are subject to the same objection and ruling. The Court does not admit the evidence in the case. It permits counsel to develop by question and answer the identification that will be needed to admit this exhibit if it ever is hereafter admitted as a part of the proof offered.

Mr. Knudsen: Thank you, your Honor.

Mr. Staring: If your Honor please, the Government [43] would gladly stipulate that Exhibit 14

(Testimony of H. E. A. Ford.)

is authentic in what it purports to be, a charter dated I believe the 6th of January.

The Court: Between this witness' principal or employer, libelant in this case?

Mr. Staring: Between libelant in this case and another party whose name I don't recall.

The Court: By which exhibit libelant became the transferee of the possession and use of the vessel for the period mentioned in Exhibit 14?

Mr. Staring: It is a time charter, I believe, isn't it?

Mr. Knudsen: Yes.

Mr. Staring: Well, I should prefer to let the document speak for itself in that regard. I will stipulate that it is a time charter and that it is authentic.

The Court: Do you stipulate who was the transferee under the charter?

Mr. Staring: Yes, the Western Canada Steamship Company is the transferee.

The Court: Does that cover the matter of your authentication of this document?

Mr. Knudsen: I believe it does, your Honor.

The Court: Then is there anything else to ask the witness as a part of the direct examination [44] of the witness?

Mr. Knudsen: Yes, your Honor.

Q. (By Mr. Knudsen): Mr. Ford, with reference to the business of Western Canada Steamship Company during the month of December, 1950, and the months of January and February, 1951, will you

(Testimony of H. E. A. Ford.)

state whether or not the company was seeking vessels or seeking to charter vessels or seeking to have vessels available for charter?

A. Well, they were seeking vessels. They were seeking cargo for their own vessels, and in fact by chartering these two vessels they were in the market for vessels.

Q. Was there a plentiful supply of vessels available in the market?

A. No. The pressure was getting so great that the actual supply was getting short, and it was continuing to mount—the pressure.

Q. In a condition of short supply of vessels, when a vessel owner who has vessels time-chartered to third persons is advised that those vessels will be redelivered at a certain date, how soon does he seek to recharter those vessels to other third persons?

Mr. Staring: I will object to that, your Honor. No proper foundation has been laid.

The Court: Read the question. [45]

(Whereupon, the last question is read by the court reporter.)

The Court: The objection is sustained.

Q. (By Mr. Knudsen): Mr. Ford, I will repeat that question and ask you to confine your answer to the specific practices of Western Canada Steamship Company in that situation, the company of which you are secretary.

Mr. Staring: I will object to that on the ground that that is immaterial.

(Testimony of H. E. A. Ford.)

The Court: The objection is sustained with leave to ask a proper form of question that might relate to some aspect of the matter encompassed within that question or intended to be encompassed within that question.

Read the form of the question so counsel can observe it.

(Whereupon, the last question is read by the court reporter.)

The Court: The objection is sustained.

I had it repeated for your information to see if there is any other form of the question concerning the subject matter of this question which you wish to use.

Mr. Knudsen: Thank you, your Honor. [46]

Q. (By Mr. Knudsen): Mr. Ford, are you familiar with the business practices of Western Canada Steamship Company with reference to its offering its vessels for charter? A. Yes.

Q. With reference to the S.S. Lake Sicamous, had she been returned, redelivered, in the latter part of December, 1950, when would the company have offered the vessel for recharter?

Mr. Staring: I will object on the ground—

The Court: Objection sustained. This company might have done everything that it did different from all other companies as to which the respondent may not have had any notice or any need of any notice. This is a breach of contract, as I understand it, is that not so?

(Testimony of H. E. A. Ford.)

Mr. Knudsen: That is correct, your Honor, and I am attempting to prove damages, and I believe that under the authorities if I am able to show that there is a reasonable possibility of available employment and a reasonable possibility that the company would have availed itself of that employment——

The Court: I do not believe you have asked that in proper form. What this company did or might have done is not binding on this one. It is a question of whether or not in the market there was an available [47] market for rechartering of the vessel upon the termination of the charter party here in question and matters of that sort.

Q. (By Mr. Knudsen): Mr. Ford, was there a market available——

The Court: To your knowledge. You should ask him something like this: State, if you know—there might have been and this witness might not have known a single thing in the world about it.

Q. (By Mr. Knudsen): Mr. Ford, do you know whether there was a market available for the rechartering of the S.S. Lake Sicamous in the latter part of December, 1950, or early January, 1951?

A. In the state of the market, yes, definitely.

Q. Pardon me?

A. In the state of the market at that time, yes.

The Court: I do not think that is a responsive answer. It is stricken, and the Court will disregard it.

(Testimony of H. E. A. Ford.)

Will you read the question, Miss Reporter, and I ask the witness if he will let the Court know whether or not he can answer it after it is read.

(Whereupon, the question was read by the court reporter as follows: "Q. Mr. Ford, do you know [48] whether there was a market available for the rechartering of the S.S. Lake Sicamous in the latter part of December, 1950, or early January, 1951?")

The Court: The answer is either yes or no, one or the other.

Q. (By Mr. Knudsen): Do you know whether there was a market available?

A. To say that specifically, no, I don't know.

The Court: Ask him another question.

Mr. Knudsen: May I confer with counsel?

The Court: You may do that.

(Conference between Messrs. Knudsen and Long.)

Mr. Knudsen: If the Court please, we will terminate our direct examination of this witness at this time and offer proof by another witness.

The Court: You may cross-examine.

Mr. Staring: I have no cross-examination.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Knudsen: Mr. Comyn.

The Court: I ask the witness who has just left the stand to remain in attendance upon the Court unless and until the Court otherwise directs. [49]

JACK GERBER COMYN

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Knudsen:

Q. Mr. Comyn, will you please state your full name and address? A. Jack Gerber Comyn.

The Court: Jack what?

The Witness: Gerber—G-e-r-b-e-r—Comyn—C-o-m-y-n.

Q. (By Mr. Knudsen): Where do you reside, Mr. Comyn?

A. 1108 Harvard Avenue North, Seattle.

Q. What is your occupation?

A. I am operating manager of the Girdwood Shipping Company here in Seattle.

Q. How long have you been in that position?

A. Since 1948.

Q. And what is the business of the Girdwood Shipping Company?

A. Steamship agents, charterers, freight-contractors, [50] steamship operators.

Q. What are your functions as operating manager of that company, specifically with respect to chartering vessels?

(Testimony of Jack Gerber Comyn.)

A. We are chartering vessels all the time, probably anywhere from twelve ships to forty or fifty ships a year on the charter market of the world.

Q. In connection with those chartering activities, what are your specific functions? What duties do you perform?

A. Figure out the amount of freight we can put on a ship, the amount of freight money it represents, the amount of money that we have to pay for the ship, and what eventual profit we would have left after the transaction had been completed.

Q. Do you, in the course of your duties, negotiate charters? A. Yes.

The Court: This information is all needed as of the time of the alleged demurrage period.

Q. (By Mr. Knudsen): Mr. Comyn, were your duties as you just related during the months of November and December of 1950 and January and February of 1951?

The Court: Will you repeat that?

(Whereupon, the last question is read by the court reporter.) [51]

Mr. Knudsen: I misspoke myself.

Q. (By Mr. Knudsen): Were the duties that you have just related to me, were they your duties during those four months?

A. Yes, they were.

Q. Will you describe your experience with respect to the chartering of vessels prior to your employment with Girdwood Shipping Company?

(Testimony of Jack Gerber Comyn.)

A. Do you mean by that what I did before I joined the Girdwood Shipping Company?

Q. Yes.

The Court: So far as chartering vessels or familiarizing yourself with the vessel chartering market.

A. From 1927, when I got out of school, I was with my father.

The Court: What was his name?

The Witness: W. Leslie Comyn, and the firm was W. L. Comyn & Co.

The Court: With offices in what building in Seattle, if you know?

The Witness: In 1927 we were not here, your Honor. We were in San Francisco. We came up here in 1929, and we were in the Skinner Building here in Seattle, and then in the Colman [52] Building.

Q. (By Mr. Knudsen): What was the business of W. L. Comyn & Co.?

A. Exactly the same as the Girdwood Shipping Company business is today.

Q. And what were your duties with that company?

A. Well, I started in as a super cargo, loading vessels, checking cargo on the docks, then went into the office, booked cargo for vessels, and then eventually I took part in the operation and the chartering of ships in that firm.

The Court: Beginning in what year did you do that latter kind of work?

(Testimony of Jack Gerber Comyn.)

The Witness: From 1932 on.

The Court: Were you or were you not in that kind of work in October, 1950, and from then on until the present time?

The Witness: Yes, sir, I was in exactly that some type of business.

The Court: You may inquire.

Q. (By Mr. Knudsen): Mr. Comyn, will you tell the Court—first, let me ask you this: At all times during your employment with Girdwood Shipping Company and specifically during the months of October, November and December of 1950 and January and February of 1951, were you fully familiar with the market rate of charter hire for vessels generally, not only [53] in the United States but over the world? A. Yes, I was.

Q. Will you state to the Court what measures you did at that time take to keep in touch with that market, to keep yourself informed as to the market?

A. Well, that is done principally by cable between our office here and our London agents. I will say practically every day—not exactly—but practically every day we have a cable going to London and practically every day they have a cable coming to us, so that each morning we have been advised of what was done in the London market the day before, who took what ships and what they paid for them for the various trades in the world.

The Court: Would the trades be identified in that information, the identity of the trading route

(Testimony of Jack Gerber Comyn.)

on which the vessel was to be employed under the charter?

The Witness: Yes, sir, it would be.

Q. (By Mr. Knudsen): Were there other sources of trade information available to you and which you consulted from time to time in keeping yourself current on the market?

A. Yes. We have a teletype between our agents in New York and ourselves here, and at least two or three times a week we had teletypes going back and forth, ours telling [54] them we were in a position in the market to charter a ship maybe to carry a cargo of coal from here to Japan or a cargo from here to South Africa or Australia, and they would also advise us as to what the last fixture on a cargo of coal was to Japan or whatever we happened to be inquiring about at that time.

Q. Are there any trade journals that you subscribed to and kept current with regarding charter rates?

A. Yes. There is the "Pacific Shipper," which is fairly good. There are also New York periodicals published in New York that we obtain once a week, and there are also market reports from our agent in New York. They put one out every week which we receive on a Monday morning.

Q. And as a part of your duties did you continually refer to those materials and keep advised of the information contained in them?

A. Yes, I had to.

(Testimony of Jack Gerber Comyn.)

Mr. Knudsen: I would like to hand the witness Libelant's Exhibit 1, if the Court please.

The Court: You may do that.

(Whereupon, Libelant's Exhibit 1 is handed to the witness.)

Q. (By Mr. Knudsen): With reference to Libelant's Exhibit 1, Mr. Comyn, are you familiar with that particular time charter? [55]

A. Yes, I am familiar with the per diem charter of the Military Sea Transport.

Q. Are you familiar with the details of the S.S. Lake Sicamous as to dead-weight cargo capacity, speed, and any other features that might affect the market rate of charter hire, the rate of charter hire applicable to that vessel?

A. I am familiar with that type of vessel, and I am also familiar at the present time as to what the vessel is worth on the present charter market today.

Q. Do you have an opinion as to the market rate of charter hire applicable to the S.S. Lake Sicamous for a time charter on terms and conditions substantially equivalent to MST 197, Libelant's Exhibit 1, had she been available for chartering during the latter part of December, 1950, or early January, 1951, do you have an opinion?

A. Yes, I have an opinion.

The Court: After he asks you this question, will you pause for a moment, Mr. Comyn?

You may propound the question.

(Testimony of Jack Gerber Comyn.)

Mr. Knudsen: I am going to ask one more preliminary question, if the Court please.

Q. (By Mr. Knudsen): Do you know whether employment would have been available to the Lake Sicamous had she been available for [56] delivery in late September?

The Court: That is perhaps another phase of the same question. Answer this yes or no.

A. Yes.

Q. I will ask you what your opinion is as to whether or not employment would have been available to the S.S. Lake Sicamous on terms and conditions substantially equivalent to those contained in MST 197, Libelant's Exhibit 1, had she been available for delivery to a charterer in the latter part of December or early January, December of '50 or early January of '51?

Mr. Staring: I object on the ground he has not laid a proper foundation.

The Court: The objection is overruled.

Do you have the question before you or do you wish it read?

The Witness: I would appreciate it being read.

The Court: Let it be read.

(Whereupon, the last question is read by the court reporter.)

A. Yes, employment would have been available.

Q. (By Mr. Knudsen): At what rate could the vessel have been chartered, time chartered, under terms and conditions substantially equivalent to

(Testimony of Jack Gerber Comyn.)

MST 197 had she been available for delivery to [57] the charterer in the latter part of December, '50, or January, '51?

A. The time charter rate would have been somewhere between \$4.75 on the dead-weight and \$5.00 on the dead-weight.

The Court: Would that have been more or less than the charter rate stated in this Libelant's Exhibit 1? Look at Libelant's Exhibit 1.

The Witness: That would be more, your Honor.

The Court: By how much, if you know?

The Witness: Approximately \$600.00 to \$700.00 per diem.

The Court: Per what?

The Witness: Per day, approximately \$600.00 to \$700.00 per day.

Q. (By Mr. Knudsen): Can you convert the rate per dead-weight ton to a per diem rate?

A. Oh, yes.

Q. Will you explain how that is done?

A. Well, you take the dead-weight tonnage of the vessel which, in the case of the Lake Sicamous, is 10,750 tons. You multiply the 10,750 tons by your rate of \$5.00 per dead-weight ton per month, and it will give you a figure of approximately \$53,000.00. You would then divide that figure by 30 days, which would then give you how much per [58] day you were paying the vessel if you were paying her the \$5.00 rate on the dead-weight.

Q. Do you know what the per diem rate is that

(Testimony of Jack Gerber Comyn.)

is equivalent to \$5.00 per dead-weight ton per month?

A. Do you want me to figure it out?

Q. Well, I know you figured it out for me yesterday.

A. I would say it is \$1,792.00 a day, isn't that correct?

Q. That is correct.

The Court: Well, I do not think counsel should testify.

Mr. Knudsen: May I ask the bailiff to give this sheet of paper to Mr. Comyn to refresh his recollection?

The Court: Let counsel see it first.

(Whereupon, the sheet of paper is shown to Mr. Staring.)

The Court: Any objection to showing it to the witness?

Mr. Staring: No objection, your Honor.

(Whereupon the sheet of paper is then shown to the witness.)

A. Yes, these are my figures.

Q. (By Mr. Knudsen): Having refreshed your recollection, what is the per diem rate that is equivalent to \$5.00 per dead-weight ton [59] per month?

A. \$1,792.00 per day on the S.S. Lake Sicamous.

Q. Will you describe the condition of the charter

(Testimony of Jack Gerber Comyn.)

market during November and December of 1950 and January and February of 1951?

A. The charter market was in rather a peculiar situation where the law of supply and demand was—where the demand part was terrifically predominant as far as tonnage and space was concerned. The charter market—if an owner owned a ship—there was so much cargo to be moved in all markets that an owner was in a position where he could demand a higher rate than was paid the week or the day before, and there was such quantities of cargo to move in all directions that the freight rates and the charter market jumped in leaps and bounds between November, 1950, and January of 1951. It was a continual rise day after day during that period.

Q. I would like to ask you with reference to the specific questions I asked you regarding the Lake Sicamous as to employment available and the rate, whether your opinion would remain the same as to availability of employment and the rate if I were to specify that the ship were available for delivery in Vancouver or Puget Sound ports during the latter part of December or early part of January. In other words, I just want to bring it down to a specific delivery point. [60]

The Witness: Would you mind reading that for me?

(Whereupon, the last question is read by the court reporter.)

A. Yes.

(Testimony of Jack Gerber Comyn.)

Q. Your opinion would remain unchanged?

A. Yes.

Mr. Knudsen: Will you hand to the witness, Mr. Bailiff, the exhibits marked for identification as Libelant's Nos. 13 and 14?

(Whereupon, Libelant's Exhibits Nos. 13 and 14 for identification are handed to the witness.)

Q. (By Mr. Knudsen): Mr. Comyn, with respect to what has been marked for identification as Libelant's Exhibit No. 13, that is the Cimon charter there. Are you familiar with that type of charter form? A. Yes, I am.

Q. Will you state what type it is?

A. It is a New York——

Mr. Staring: I object, your Honor, to this line of questioning on the same grounds as before. These charters, Exhibits 13 and 14, are irrelevant and immaterial.

Mr. Knudsen: If the Court please, Mr. Comyn is an expert in the field of chartering, and I would like to [61] establish by him that these charters contain substantially the same terms and conditions as does Libelant's Exhibit No. 1.

The Court: The objection is sustained. You will have to prove the same information by means different than that, different from specific contracts, until you convince the Court that specific contracts in an Admiralty case involving a charter party are governed by a rule different from that which ordinarily governs actions on a contract.

(Testimony of Jack Gerber Comyn.)

Mr. Knudsen: If the Court please, I think this stands on the same principle as is involved where one shows contemporaneous sales of property to establish the fair market value of the property.

The Court: Men may agree for reasons peculiar to their own attitudes on a rate different or on a rate like some other specific agreement. It is a question of market.

Mr. Knudsen: The market is made up only of individual charterers.

The Court: Well, you cannot take individual contract proof unless this charter party field of the law is different from that of the ordinary contract field of the law.

Mr. Knudsen: In the event that the Court should [62] ultimately rule in this aspect in my favor, may I offer in evidence a charter which Mr. Comyn himself negotiated during January of 1950? I would like to have it marked.

The Court: Not over the objection of counsel.

Mr. Staring: Objection.

The Court: Objection sustained.

Mr. Knudsen: May I have it marked as an exhibit and identified?

The Court: You may.

Mr. Knudsen: This may be referred to briefly as the Aliakmon charter.

The Clerk: Libelant's Exhibit No. 15.

(Aliakmon charter marked Libelant's Exhibit No. 15 for Identification.)

(Testimony of Jack Gerber Comyn.)

The Court: I do not wish to take up the time of the Court in these matters. You just better get them all together and see if you cannot get from counsel a stipulation as to their identity and make the offer and let the Court rule upon it. I do not think we should hear testimony of this kind now. It will take up the Court's time to hear it. You may identify the matters so you can get them before the Court.

Mr. Staring: Your Honor, I will stipulate that [63] Exhibit No. 15 is authentic in what it purports to be.

Mr. Knudsen: Your Honor, then I will make offer of proof. I will offer to prove by the testimony of this witness that Girdwood Shipping Company in January of 1951, on January 11, 1951, negotiated the time charter of the Aliakmon, an American Liberty-type ship owned by a Greek ship owner on substantially the same terms and conditions as MST-197, the vessel being substantially the same as the S.S. Lake Sicamous as far as deadweight tonnage and speed are concerned, for a charter rate of \$5.25 per deadweight ton, which rate, when applied to the deadweight tonnage of the S.S. Lake Sicamous would yield a per diem rate of \$1881.00 per diem.

Mr. Staring: We will renew the objection, Your Honor.

The Court: That objection is sustained.

Mr. Knudsen: May I confer with counsel?

The Court: You may.

(Testimony of Jack Gerber Comyn.)

(Conference between Mr. Knudsen and Mr. Long.)

Q. (By Mr. Knudsen): Mr. Comyn, if the S.S. Lake Sicamous had been offered to you in December for charter calling for delivery in early January, could you have obtained a charter for the vessel? [64]

A. Yes, I could.

Q. And could you have obtained a charter containing substantially the same terms and provisions as are included in MST-197, Libelant's Exhibit 1?

A. Basically, yes.

Q. And at what rate could you have obtained that charter?

Mr. Staring: I object, Your Honor. This is purely speculation and conjecture as to what rate he could have obtained.

The Court: The objection is sustained. As an expert he has already testified about the market.

Mr. Knudsen: I have no further questions.

Cross-Examination

By Mr. Staring:

Q. Mr. Comyn, so that I will understand the operations of Girdwood Shipping Company a little better, is it correct that Girdwood Shipping Company is engaged in a ship brokerage business?

A. Yes.

Q. You stated, I believe, that you chartered from twelve to forty or fifty ships a year, was that correct?

A. Yes.

(Testimony of Jack Gerber Comyn.)

Q. And for whose accounts were they chartered? [65]

A. For the account of the Girdwood Shipping Company.

Q. When you gave those figures, were you referring to transactions in which Girdwood Shipping Company became a charterer in the sense that it was entitled to the use of the vessel?

A. Yes, sir, they became the principal.

Q. They became the principal? What use did Girdwood Shipping Company make of these vessels?

A. Principally carrying lumber cargoes to the South of Africa, to Australia, to Ceylon, to Japan, to India, and to the United Kingdom.

Q. Did Girdwood Shipping Company do any subchartering of the vessels you speak of?

A. No, they did not.

Q. Mr. Comyn, you stated in response to a question of counsel concerning the rise in charter rates in November and December, 1950, and January and February of 1951, that a rise took place of between \$4.75 and \$5.00 per deadweight ton, is that right?

A. Please repeat that again.

Q. Counsel asked you, I believe, about a rise in charter rates on vessels of the Lake Sicomous type in November and December, 1950, and January and February, 1951, and did you answer that rates in that period rose to between \$4.75 and \$5.00 per deadweight ton? [66]

A. Yes.

Q. Now, can you tell us more specifically at what

(Testimony of Jack Gerber Comyn.)

point in that period the first rise in rates took place?

A. The first rise started taking place in early November. The charter market was about \$2.15 or \$2.20 on the deadweight per ton per month in early November. By the end of November it had climbed from \$2.15 or \$2.20 clear up to \$3.00 per ton on the deadweight.

The Court: Is that the advance or the result of the advance?

Witness: No, sir. That is the advance of the market itself.

The Court: That was by what period, December, or what?

Witness: No. That is from the start of November until the end of November.

The Court: 1951?

Witness: 1950, sir.

The Court: About \$3.00 a ton you say was the amount of the advance during that month?

Witness: It advanced from about \$2.15 to \$3.00.

The Court: Well, that was about 85c.

Witness: Yes, sir, that is correct.

The Court: 85c a deadweight ton?

Witness: Yes, sir. [67]

The Court: You may proceed.

Q. (By Mr. Staring): Mr. Comyn, then do I understand you correctly that at the end of November it stood about \$3.00 per deadweight ton?

A. Yes.

Q. Now, what would it have been on the 4th of December?

(Testimony of Jack Gerber Comyn.)

The Court: What year?

Q. In 1950.

A. Approximately \$3.00 to \$3.25.

The Court: To what date in December?

Mr. Staring: That was December 4, Your Honor.

Q. (By Mr. Staring): Mr. Comyn, does Girdwood Shipping Company always pay the same rate as Military Sea Transportation Service on comparable charters? A. No, sir.

Q. Does it always pay the same rate as other charterers? A. Yes.

Q. Comparably? Is that rate affected by the location of the vessel? A. Yes.

Q. Location of the charterer—of the cargo?

A. Yes, but not of the charterer. [68]

Q. Is it affected by the type of cargoes carried?

A. Yes.

Q. Mr. Comyn, do you know whether the increase in rates in November and December, 1950, which you have testified to was well known in the shipping industry?

A. Yes, it was. It is common knowledge.

Q. Would you say it was a business fact known to every major shipping company? A. Yes.

Mr. Staring: May I confer with counsel?

The Court: You may.

(Conference between Mr. Staring and Mr. Cushman.)

Mr. Staring: I have no further questions, Your Honor.

(Testimony of Jack Gerber Comyn.)

The Court: Anything on redirect?

Mr. Knudsen: Yes, Your Honor.

Redirect Examination

By Mr. Knudsen:

Q. Counsel asked you on cross-examination, Mr. Comyn, to develop the increase of rates to the end of November and then state the rate on December 4th. Will you continue with that and trace the development of the rates specifically to the end of December and then in the early part of January and [69] the early part—I mean then the latter part of January and the early part of February and the latter part of February? A. Yes.

The Court: Will you let me have, if you can, that information in the form of the margin of advance, and do not speak of the over-all market but the amount of the advance in the rate.

Witness: All right, Your Honor.

A. We will proceed from December 4 when, if I remember correctly, I said that the rate was somewhere between \$3.00 and \$3.25 per deadweight ton.

The Court: By December 4?

Witness: Yes.

The Court: How much was the advance from the 85c advance in November to the 4th day of December?

Witness: From no advance to 25c advance, Your Honor.

The Court: Pardon?

(Testimony of Jack Gerber Comyn.)

Witness: From no advance to 25c.

The Court: I said November. I understood you on cross-examination to say that from November 1 to the end of November the margin of the advance of the rate per deadweight ton was 85c.

Witness: That is right, Your Honor. That is what I said. [70]

The Court: Now, what was the margin of the advance from that date, the end of November, until the 4th day of December of 1950?

Witness: 25c a deadweight ton, Your Honor.

The Court: And how much from the 4th, in terms of advance, was experienced within the time specified by Mr. Knudsen in his question? Do you have it?

Witness: Yes. I will get it for you in a second.

From the 4th of December until the end of December the rate had advanced 75c per deadweight ton per month.

The Court: Ask him another question.

Q. (By Mr. Knudsen): That advance then is the difference between \$3.25 and what figure?

A. \$4.00—between December 4 and December 31.

Witness: I believe that is what you requested, Your Honor.

The Court: Well, I didn't request the \$4.00; counsel did. I requested the amount of margin.

Witness: Well, that was the margin, 75c.

Q. (By Mr. Knudsen): Now, what further advance occurred in the first ten days of Janu-

(Testimony of Jack Gerber Comyn.)

ary? [71] A. It approximated another \$1.00.

Q. That is from what amount to what amount?

A. It went from \$4.00 to approximately \$5.00 in a very short period of time there.

Q. That was in the first ten days of January?

A. Yes.

Q. Then what was the rate by the end of January? What was the further advance by the end of January?

Mr. Staring: If Your Honor please, I will object to counsel concerning himself now with a period which is irrelevant and immaterial to this case.

The Court: The Court is going to overrule this objection because it shows the market trend for a reasonable amount of time after the particular date during which he claims damages.

Mr. Knudsen: You may answer the question.

Witness: Will you repeat it, please?

Q. (By Mr. Knudsen): What further advance occurred between approximately the 10th of January and January 31st?

A. Another 50c per ton on the deadweight.

The Court: That is as to the end of January? That means that after the first ten-day period in that month there was another increase of how much?

Witness: 50c. [72]

The Court: You may inquire.

Q. (By Mr. Knudsen): And that was from what rate to what rate?

A. From \$5.00 to \$5.50.

(Testimony of Jack Gerber Comyn.)

Q. And what further advance occurred during the first twelve days of February?

A. Another 50c.

The Court: The first twelve days, did you say?

Mr. Knudsen: Yes, Your Honor.

The Court: All right. Anything else?

Q. (By Mr. Knudsen): Did the market generally advance further after that?

A. Yes, it did for a short while.

Mr. Knudsen: That is all.

The Court: Any recross-examination?

Mr. Staring: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: You may call the next witness.

Mr. Knudsen: If the Court please, I would at this time—Your Honor, may Mr. Comyn be excused to return to his office?

The Court: Any objection?

Mr. Staring: No objection.

The Court: Mr. Comyn is excused and may go on [73] about his business if that is his wish.

Mr. Knudsen: If the Court please, I would like to move that the deposition of Capt. Robert Craig——

The Court: All depositions in this case now in the Clerk's hands remaining unpublished are now published and all members of the public and counsel and others may have access to them.

Mr. Knudsen: I would like to commence the

reading of this deposition of Capt. Craig if the Court please.

The Court: You may do that. Skip the formal parts, will you, and begin—This deposition is on unnumbered lines, which makes it a little difficult. Begin where you ask the first question, Mr. Knudsen, will you?

Mr. Knudsen: Thank you, Your Honor. May Mr. Long take the stand as a witness?

The Court: Yes. If he is willing to read the answers I wish he would take the stand and let us proceed.

(Whereupon, the reading of the deposition of Robert Craig was commenced with Mr. Knudsen reading the questions and Mr. Long reading the answers as follows:)

DEPOSITION OF ROBERT CRAIG

“ROBERT CRAIG

“a witness called by the Libelant, being of [74] lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Direct Examination

“By Mr. Knudsen:

“Q. Captain, will you state your full name?

“A. Robert Craig.

“Q. Where do you reside, sir?

“A. 17132 Burnham Avenue, Lansing, Illinois.

“Q. Is that your permanent residence?

“A. It is.

(Deposition of Robert Craig.)

“Q. Where are you employed?

“A. Wilcox & Follett Company, 1255 South Wabash Avenue, Chicago.”

The Court: This is a long deposition. Let us go through the reading at a more rapid pace.

Mr. Long: Very well, Your Honor.

“Q. And that is your permanent employment, I take it? A. It is, yes, sir.”

The Court: Just pass that and go on. We will be here tomorrow if you read every such thing as that in this deposition.

Mr. Knudsen: Fine, Your Honor. I will skip down over the next several lines then to the next question of the witness regarding this case. [75]

“Q. Captain, as I understand it, you were the Master of the Lake Sicamous, the S.S. Lake Sicamous, during July, 1950, and continuously after that date through the month of February, 1951, is that correct? A. I was.

“Q. And as such you were employed by Western Canada Steamship Company, Limited, the Libelant in this case? A. I was, yes.

“Q. Are you now employed by that company?

“A. No, sir.

“Q. Do you have any connection or affiliation with that company? A. None at all.

“Q. Are you a citizen of the United States?

“A. No, not yet.

“Q. Do you intend to become a citizen of the United States? A. I do.

(Deposition of Robert Craig.)

“Q. Until you do become a citizen of the United States, what is your citizenship?

“A. British, British National.

“Q. I understand you were born in Glasgow.

“A. I was, yes.

“Q. And you came to Canada in 1948?

“A. 1948. [76]

“Q. And when did you move from Canada to Lansing, Illinois? A. In May of 1952.

“Q. Captain, when did you commence going to sea?

“A. June of 1927 I went to sea first of all.

“Q. In what capacity? A. As a cadet.

“Q. Did you thereafter become an officer in the British Merchant Marine?

“A. I did, yes. I got my Second Mate's certificate in October, 1931, and then afterwards was Quartermaster.

“Q. You served as Quartermaster?

“A. I served as Quartermaster after that; and in 1933 I left the sea through illness, and returned to sea again in June of 1940.

“Q. In what capacity?

“A. As Third Officer with the Anchor Line Steamship Company of Glasgow.

“Q. How long did you serve as Third Officer with the Anchor Line?

“A. I was Third Officer from June of 1940.

“Q. You commenced your experience as Third Officer about June, 1940? A. Yes.

“Q. Captain, do you have with you your Certifi-

(Deposition of Robert Craig.)

cate of [77] Discharge issued by the British government? A. I have.

“Q. And does that contain a record of your service in the Merchant Marine? A. It does.

“Q. And are you referring to that now when you give your experience at sea? A. I am.

“Q. How long did you serve as Third Officer for the Anchor Line?

“A. From June, 1940, until February of 1942 as Third Officer.

“Q. What type of ships were you sailing on?

“A. On cargo ships of around about 8,000 tons, gross tonnage.”

Mr. Knudsen: Skipping the objection, if the Court please, to my next question on page 7——

“Q. As I understand it, Captain, you received your First Mate's certificate in July of 1942?

“A. Yes, I did.

“Q. And you served as a Second Officer for the Line, the Anchor Line, from July of 1942 until July of 1943? A. I did, yes.

“Q. That service was aboard a troopship of approximately 12,500 tons gross? [78]

“A. Yes, the California.

“Q. You served as Second Officer for the Anchor Line thereafter from October of 1943 until January of 1945, which service was aboard freighters of approximately 8,000 tons gross?

“A. Yes.

“Q. Your service for the Anchor Line was worldwide? A. Yes.

(Deposition of Robert Craig.)

"Q. You received your Master's Certificate in May of 1945 which is British Certificate No. 53488 and entitles you to sail all oceans and any tonnage?

"A. That is correct.

"Q. You served as a First Mate for the Currie Line operating out of Leith, Scotland, from May, 1945, until December, 1947. This was service involving the Mediterranean and Baltic on freighters of approximately 1,000 tons gross?

"A. That is correct.

"Q. Thereafter, Captain, is it true that you served for the Western Canada Steamship Company, Limited, operating out of Vancouver, British Columbia, Canada, as First Mate from April of 1948 to June of 1950 aboard various vessels, primarily Canadian Liberties of between 7,000 to 8,000 tons gross?

A. That is correct.

"Q. In June of 1950 you became Master of the S.S. Lake [79] Sicamous?

A. I did, yes.

"Q. Owned by the Western Canada Steamship Company, Limited, and served in that capacity until February, 1952?

A. I did that.

"Q. And your service for Western Canada was worldwide?

A. It was.

"Q. Captain, when did you first learn of the charter of the vessel to the United States, the charter involved in this action?

"A. Well, I was on a voyage from Japan back to Vancouver when I received instructions, about four days off the west coast, to proceed to Seattle, to load for the United States Government."

(Deposition of Robert Craig.)

Mr. Knudsen: Now, if the Court please, I will ask that the log books now be marked for identification. That is the first one.

The Court: Why don't you make copies of the log books and have them brought here and let counsel look at the original log book and compare it with the copy and see if the copy could be used? You ought never needlessly clutter up the Court's files with parts of books in large dimensions, objects that cannot be neatly filed, unless, because the original document is the only thing you can get [80] in evidence, you have to use the original document.

Mr. Knudsen: Our reason for using the books themselves, your Honor, was that our references to these logs are so detailed and cover so many pages that it seemed it would be confusing.

The Court: All right. The time might come when the ship operator would wish to keep the official log in his file for reasons other than this lawsuit, and it is too bad that he cannot, but have that in mind in the future. When you can possibly shorten or make things more convenient in that way, arrange to do it.

The Clerk: Libelant's Exhibits 16, 17 and 18.

(Log book marked Libelant's Exhibit No. 16 for identification.)

(Log book marked Libelant's Exhibit No. 17 for identification.)

(Log book marked Libelant's Exhibit No. 18 for identification.)

(Deposition of Robert Craig.)

Mr. Knudsen: If there is no objection, your Honor, I will transpose the references in the deposition to the present markings.

The Court: If that is desired, the Court approves of it. The exhibits are what? [81]

The Clerk: Exhibits 16, 17 and 18.

The Court: Log books, are they?

The Clerk: Yes, your Honor.

Mr. Knudsen: (Reading.)

“Q. Captain, I will hand you what is marked as Libelant’s Exhibit 16 for identification and ask you if you can identify it?

“This is the log of the S.S. Lake Sicamous, of which I was Master at the time that this log covers.

“Q. Now, which log is that; that is to say, the rough log or the deck log?

“A. This is the deck log.

“Q. What dates does that cover?

“A. The first entry in the log was made on July 25, 1950, until October 21, 1950, at 2400.

“Q. Who made the actual entries in the log?

“A. The officers in charge of the deck at the time.

“Q. And were they under your supervision?

“A. They were.

“Q. And you recognize their signatures and initials where they appear? A. I do.

“Q. You identify this as the original deck log?

“A. I do, yes.

“Q. Handing you what has been marked as Li-

(Deposition of Robert Craig.)

belant's [82] Exhibit No. 17, will you identify that in the same manner?

"A. This is the log of S.S. Lake Sicamous, of which I was Master, covering the period from October 22, 1950, until January 25, 1951.

"Q. And you identify that as the original deck log of the vessel?

"A. That is the original deck log, yes.

"Q. Handing you Libelant's Exhibit 18 for identification, will you identify that in the same manner?

"A. This is the log of the Lake Sicamous of which I was Master covering the period from January 26, 1951, until February 20, 1951.

"Q. And this also is the original deck log of the vessel? A. Yes, sir.

"Q. And all the entries in this log were made by your officers under your supervision?

"A. They were, yes, sir.

"Q. And you recognize their initials and signatures where they appear? A. I do, yes, sir."

Mr. Knudsen: If the Court please, I offer these logs in evidence.

Mr. Staring: No objection.

The Court: Each of them is admitted. [83]

(Libelant's Exhibits Nos. 16, 17 and 18 received in evidence.)

Mr. Knudsen: Now, skipping over to page 12, in the middle of the page—— (Reading.)

"Q. Captain, I hope you will feel free to refresh

(Deposition of Robert Craig.)

your recollection by reference to the log wherever you feel it is necessary.

“Directing your attention to the first voyage under the charter, M.S.T. 197, I would like to call to your attention that it is admitted in the pleadings that the vessel was delivered to the United States on August 4, 1950, at the hour of 1200 Pacific Daylight Savings Time, at Seattle, Washington.

“Were you given any instructions by the United States with respect to the first voyage under the charter?

“Mr. Ferguson: At what time?

“Q. At or about the time of delivery.

“Mr. Ferguson: That is, August 4, you mean? At or about August 4, 1950.

“Mr. Knudsen: Yes.

“The Witness: Well, my instructions were to proceed to Mukilteo, Washington, after the ship was prepared for loading ammunition, and load a full cargo of ammunition—bombs in this case.”

The Court: I don't care about all that. Skip [84] all that.

Mr. Knudsen (Reading):

“Q. Incidentally, Captain, what hour Greenwich Mean Time is 1200 Pacific Daylight Savings Time?

“A. Pacific Standard Time?

“Q. At Seattle?

“A. At Seattle. Pacific Standard Time is eight hours behind Greenwich Mean Time.

“Q. How about Daylight Savings; is that seven hours? A. Seven hours, yes.

(Deposition of Robert Craig.)

“Q. So it would be 1900 G.M.T.

“A. That is right.

“Q. Where did you have the vessel lined for cargo? A. At Tacoma, Washington.

“Q. And at what time was the lining completed?

“A. The lining was completed on August 9 at 0400.

“Q. And when did you commence loading at Mukilteo?

“Mr. Ferguson: Let it be noted that the Captain is referring to the log book.

“The Witness: The log book, yes.

“A. On the 11th of August, 1950, at 0900 she commenced loading.

“Q. And when was loading completed, according to the log?

“A. On August 25 loading was completed at [85] 1730.

“Q. According to my calculations, Captain, that is an elapsed time for loading of 14 days, 8 hours and 30 minutes, is that correct?

“A. I believe so.

“Q. How did the loading progress with respect to the number of hours worked each day?

“A. On the whole, they worked about 20 hours a day, 20 to 24 hours a day.

“Q. How did the loading progress with respect to working on Saturdays and Sundays?

“A. The first Sunday they worked until 5:00 o'clock in the morning and didn't work any more

(Deposition of Robert Craig.)

that day, and resumed at 8:00 o'clock on Monday morning.

"Q. How about Saturday, the day before?

"A. Saturday, they worked all day that Saturday.

"Q. When you say 'all day' how many hours a day do you mean?

"A. They worked all that Friday night until 1900 on Saturday—I beg your pardon—they worked right through Saturday.

"Q. Until when? A. 2400. The full day.

"Q. Now, on Saturday, August 19th, Captain?

"A. They worked all day on Saturday, and they worked right through Sunday also. [86]

"Q. You said that loading was completed on August 25th at 1730. When did the vessel sail?

"A. We sailed at 1819, when we let go.

"Q. On that same day?

"A. On that same day, yes.

"Q. Captain, did you receive written instructions from the United States with respect to the voyage? A. Yes.

"Q. What were those instructions?"

Mr. Knudsen: I think we can skip over that, Mr. Long, to page 17.

The Court: The first question on the third line, Mr. Knudsen.

Mr. Knudsen: (Reading.)

"Q. Did you send copies to the owners?

"A. No, I didn't send any copies to the owners.

(Deposition of Robert Craig.)

“Q. All written instructions that you received you turned over to M.S.T.S. at destination?

“A. Yes, sir.

“Q. Now, what were those instructions?

“A. Those instructions on the first voyage were to proceed to Okinawa and there discharge the cargo.

“Q. And did you do so? A. I did.

“Q. When did you arrive at Okinawa? [87]

“I direct your attention, Captain, to approximately September 16th or 17th.

“A. We arrived in Buckner Bay, Okinawa, on September 17th.

“Q. At what hour?

“A. Well, we were all fast at 0745.

“Q. When did discharge commence at Buckner Bay? A. Discharge commenced at 0920.

“Q. That same day? A. That same day.

“Q. When was discharge completed?

“I direct your attention, Captain, to September 27th.

“A. Completed discharge on September 27th at 0100.

“Q. According to my calculations, Captain, that is an elapsed time for discharge of 9 days, 15 hours and 40 minutes, is that correct?

“A. I believe so.

“Q. How did the discharge progress, Captain, with respect to hours worked during the day?

“A. They worked throughout the day.

“Q. When you say ‘throughout the day,’ how many hours a day do you mean?

(Deposition of Robert Craig.)

“A. 24 hours a day except for meals.

“Q. How did the loading progress with respect to work [88] on Saturdays and Sundays?

“A. They worked on Saturdays and Sundays.

“Q. They worked a 7-day week? A. Yes.

“Q. When did the vessel depart from Okinawa?

“A. The vessel left Okinawa on September 27th at 0430—1327, my mistake.

“Mr. Ferguson: May I ask you if that is the rough or the smooth log?

“The Witness: This is the rough log, the original entries.

“Q. Captain, when you are referring to specific dates and hours here, are you taking those from the log? A. I am, yes.

“Mr. Ferguson: In other words, you can't remember those dates specifically now?

“The Witness: No.

“Mr. Ferguson: And it is necessary to refresh your memory?

“The Witness: Yes.

“Mr. Ferguson: By using the log.

“The Witness: Yes.

“Q. Where were you bound when you departed from Okinawa?

“A. We were bound back to Seattle. [89]

“Q. When did you arrive, Captain, referring you to October 13th in the log?

“A. We arrived at 2136.

“Mr. Ferguson: What day?

(Deposition of Robert Craig.)

“The Witness: That is on October 13th, 1950, at 2136.

“Q. Pacific Standard Time?

“A. Pacific Standard Time.

“Q. What time is that G.M.T. in Seattle?

“A. It is plus eight hours; would be October 14, at 0536 G.M.T.

“Q. Was that the conclusion of voyage No. 1, under the charter? A. It was, yes.

“Q. According to my figures, Captain, that is an elapsed time for the first voyage of 70 days, 10 hours, 36 minutes—that is from the time of delivery to the end of the first voyage, is that correct?

“A. I believe so.

“Q. Before I go on, Captain, let me ask you one or two more questions regarding——”

Mr. Knudsen: Well, I won't ask those if the Court please.

I would like to start on the third question on page 21. (Reading.) [90]

“Q. Captain, when you say that these logs are accurate with respect to times when they record that certain events happened, such as ship breaking ground, at an odd number of minutes, is that accurate? A. Yes, sir.

“Q. Was that entry made at the time?

“A. That entry was made at the time, yes.

“Q. Now, Captain, directing your attention to the second voyage, did you receive instructions from the United States concerning the second voyage

(Deposition of Robert Craig.)

after you had returned to Seattle from the first voyage? A. Yes.

“Q. What were those instructions, generally, first.”

Mr. Knudsen: At the top of page 22, Mr. Long.

Mr. Long: You are skipping the bottom of the page?

Mr. Knudsen: Yes.

“A. After refueling we proceeded to Tacoma, and the wood lining was repaired and the ship made ready for taking aboard another cargo of ammunition.

“Q. When did the second voyage commence?

“A. The second voyage commenced on October 13, 2136.

“Q. Pacific Standard Time?

“A. Pacific Standard Time.

“Q. Captain, at what time was the vessel refueled, [91] the lining repaired, and the vessel ready to load?

“A. 1645 the lining was repaired and the vessel was ready to load.

“Q. On what date?

“A. That was on October 15th.

“Q. At 1645? A. At 1645.

“Q. And when and where did you commence loading?

“A. We commenced loading at Bangor, Washington.

“Q. Bangor?

(Deposition of Robert Craig.)

“A. Bangor, at the Naval Ordnance Dock there. We commenced loading at 1815 on October 17th.

“Q. What were you doing during the interim between October 15th and 1645 and October 17 at 1815?

“A. We were waiting for a berth in Bangor, Washington.

“Q. Who arranged for the berth under the charter?

“A. The M.S.T.S. arranged that; Military Sea Transportation Service.

“Q. Captain, are you familiar with the custom in west coast ports regarding the loading of vessels, first with respect to the number of hours customarily worked during a day; and, second, with respect to the working on week ends?”

Mr. Staring: I will object to that question on the grounds no proper foundation has been laid. [92] It is not shown that——

Mr. Knudsen (Reading):

“Q. I will ask you, Captain, if you are familiar with the custom in west coast ports that I referred to? A. I am, yes.”

Mr. Staring: I renew my objection.

The Court: The objection is overruled.

Mr. Knudsen: (Reading.)

“Q. What is that custom, first, with respect to the number of hours worked during the day?

“A. Well, it is the custom on the west coast to work a full——”

The Court: This objection is overruled.

Mr. Knudsen: (Reading.)

(Deposition of Robert Craig.)

“Q. You may answer, Captain.

“A. It is the custom on the west coast to——

“Mr. Ferguson: Now, by ‘west coast’ you mean Canada or the United States?

“The Witness: That is the west coast, which includes Canada and right down the west coast.

“Q. Canada and the United States.

“A. And the United States, yes. It is the custom there to have continuous loading.

“Q. 24 hours a day?

“A. 24 hours a day. [93]

“Q. Is that true with respect to general cargo and bulk cargo? A. It is, yes.

“Q. What is the custom with respect to a 7-day week? A. Well, they work week ends also.

“Q. And that is true with respect to both grain cargoes and general cargoes?

“A. It is true, yes.

“Q. Was this custom followed by the United States in loading the vessel at Bangor, Washington?

“A. No. We didn’t work week ends.

“Q. When did loading commence, Captain?

“A. Loading commenced on October 17th at 1815.

“Q. And how long did they load on that day?

“A. They loaded on that day from 1815 until midnight.

“Q. And on October 18th?

“A. And on the 18th they loaded right through the 24 hours except for meal hours.

“Q. And on the 19th?

(Deposition of Robert Craig.)

“A. On the 19th they loaded through the 24 hours except for meal hours.

“Q. And on the 20th.

“A. On the 20th, the full 24 hours except for meal intervals.

“Q. And on the 21st. [94]

“A. On the 21st, they loaded until 0730 when they ceased loading for the day.

“Q. No cargo was loaded from 0730 until 2400 on that day, is that correct?

“A. Yes, that is right.

“Q. On the 22nd.

“A. On the 22nd, which was Sunday, there was no work done at all.

“Q. And on Monday, the 23rd.

“A. Monday, the 23rd, they commenced loading at 0730 and worked right up until midnight.

“Q. And on the 24th.

“A. On the 24th they commenced loading at 0730 and worked until 1700.

“Q. And they did not work from 1700 until 2400? A. They did not.

“Q. On the 25th.

“A. On the 25th they commenced work at 0730 and ceased at 2400.

“Q. And on the 26th.

“A. On the 26th they commenced at 0730 and ceased work at 2400.

“Q. Excuse me, Captain. Was Thursday the 26th? A. Thursday, the 26th.

(Deposition of Robert Craig.)

“Q. Now, will you refer to the log very closely for [95] that day, please?

“A. The entries read:

“ ‘0730, 5 gangs resumed loading. 1050 ceased work for meals. 1130 resumed loading. 1245 ceased loading.’ Then: ‘1630, one gang aboard to load No. 2 lower hold.’

“Q. Was any loading going on then from 1245 until 1630? A. No, none at all.

“Q. Does the log state why?

“A. The log does not state, within those hours, any reason.

“Q. And 1 gang came aboard to load No. 2 at 1900, is that correct?

“A. That is right—at 1630.

“Q. At 1630. Now, will you read the rest of the entries for that day?

“A. And at 1900 there was one gang loading No. 4 lower hold.

“Q. Until what hour? A. Until 2400.

“Q. At which time what happened?

“A. At which time the work ceased and the hatches were covered.

“Q. And what was done on the 27th, Captain?

“A. On the 27th they commenced loading again at 0730, [96] and they worked until 2400 when the hatches were covered.

“Q. On the 28th.

“A. On the 28th, which was Saturday, there was no loading done at all.

“Q. On the 29th.

(Deposition of Robert Craig.)

“A. On the 29th, which was Sunday, there was no loading done.

“Q. And on the 30th.

“A. On the 30th they came aboard, commenced loading at 0730, and they ceased loading for the day at 1550.

“Q. On the 31st.

“A. On the 31st they commenced loading at 0730 and ceased loading for the day at 1600.

“Q. And on November 1st.

“A. On November 1st they commenced loading at 0730 and ceased loading at 1600.

“Q. And on November 2nd.

“A. November 2nd, commenced loading at 0730 and ceased loading at 1600.

“Q. On November 3rd.

“A. On November 3rd they commenced loading at 0730 and ceased loading at 1600.

“Q. Excuse me, Captain. Will you read the entries on November 3rd in detail?

“A. (Reading): ‘0600 riggers aboard to uncover hatches [97] 0730, 5 gangs resumed loading. 1045 ceased work for meal. 1125 resumed loading. 1245 ceased loading awaiting cars. 1415 resumed loading, cars arrived.’

“Q. What cars does that refer to, Captain, do you know?

“A. The cars bringing the ammunition to the ship.

“Q. Was that railroad cars?

“A. Yes. And ‘1600 ceased work for the day.’

(Deposition of Robert Craig.)

“Q. November 4th.

“A. November 4th, Saturday, no work this day.

“Q. November 5.

“A. November 5, Sunday, no work that day.

“Q. November 6th.

“A. November 6th, 0730 commenced loading; and 1600 ceased loading for the day.

“Q. The 17th.

“A. November 7, 0730 commenced loading; and 1600 they ceased work for that day.

“Q. And the 8th.

“A. On the 8th, 0730, commenced loading, and 1600 ceased work for the day.

“Q. And on the 9th.

“A. On the 9th, 0730 commenced loading, and 1600 ceased work for the day.

“Q. And on the 10th, sir. [98]

“A. On the 10th, commenced loading 0730, and completed loading at 1130.

“Q. That was Friday, November 10th, was it not, Captain? A. Friday, November 10th.

“Q. And at what time did the vessel sail?

“A. The vessel sailed at 1340.

“Q. On that same day?

“A. On that same day.

“Q. Captain, have you, prior to this deposition, reviewed the log with me and computed the number of days that it took to load this vessel at Bangor?

“A. Yes, I have.

“Q. Do you recall that number of days offhand?

“A. No.

(Deposition of Robert Craig.)

“Q. Might I ask you, Captain, if you will start then at 1815 in the log on October 17 and count the days?”

Mr. Staring: Skip that.

Mr. Knudsen: (Reading.)

“Q. Is it true, Captain, that the loading took place on portions of 25 consecutive days?

“A. Yes, according to our computation.

“Q. During that time, Captain, is it also true that no cargo was worked a total of 13 days, 21 hours, and 45 minutes? [99]

“A. That is correct.

“Q. Based upon your experience as an officer and Master of ocean-going vessels, Captain, was that vessel loaded within a reasonable time at Bangor, Washington, having in mind the cargo loaded, and the amounts thereof?”

Mr. Staring: At this moment I am going to——

The Court: The objection is overruled.

Mr. Long: The answer to that question is: “I don’t think so.”

Mr. Knudsen: (Reading.)

“Q. Captain, based on your experience, do you have an opinion as to what would be a reasonable time to load that cargo aboard that vessel? First, do you have an opinion? A. I have, yes.

“Q. What is that opinion?”

The Court: That objection is overruled, also. The Court has considered it.

Mr. Knudsen: (Reading.)

(Deposition of Robert Craig.)

“Q. Captain, what cargo was loaded at Bangor, Washington? A. Ammunition.

“Q. What facilities were available for loading at Bangor?

“A. All the ship's equipment was available for loading cargo, all the ship's derricks and [100] winches.

“Q. Was the vessel in berth?

“A. She was, yes.

“Q. Who brought the cargo alongside?

“A. Longshoremen.

“Q. Who hired the longshoremen?

“A. Military Sea Transportation Service, according to what I know.

“Q. Were they civilian longshoremen?

“A. They were, yes.

“Q. How was the ammunition brought alongside; that is, by what form of transportation?

“A. It was taken out of railway cars and longshoremen handled it on these little trucks, brought them to shipside, and they were hoisted on board by the ship's derricks.

“Q. Captain, using the facilities that were actually used, if cargo had been brought alongside 24 hours a day, 7 days a week, how long would it have taken to load that vessel, in your opinion?”

Mr. Staring: Same objection.

The Court: Overruled.

Mr. Long: (Reading.)

“A. In my opinion, 12 days would be a reasonable time for loading that cargo.

(Deposition of Robert Craig.)

“Q. When did the vessel break ground departing from Bangor? [101]

“A. On November 10, 1950, at 1340.

“Q. Prior to breaking ground did you receive written instructions, sailing instructions, from the United States? A. I did.

“Q. What were those instructions?

“A. Those instructions were to proceed to Yokohama and there discharge the cargo.

“Q. Is that Yokohama, Japan?

“A. Yokohama, Japan.

“Q. Did those instructions specify the course?

“A. I received instructions, routing instructions from what I understand to be the Naval Control Service Officer, I believe, of the Port of Embarkation, Seattle, Washington.

“Q. Captain, what is the customary route from Seattle or Bangor, Washington, to Yokohama, Japan?

“A. The usual route is a composite great circle from Seattle, Washington, to Yokohama, Japan.

“Q. What is the most expeditious route from Seattle or Bangor, Washington, to Yokohama, Japan?

“A. The most expeditious route is that composite great circle.

“Q. Would you briefly describe what that composite great circle route is?

“A. On leaving Seattle a great circle is plotted to a point approximately 50 to 100 miles south of the Aleutians. [102] and then we sail west until we

(Deposition of Robert Craig.)

arrive at another point from which we make another great circle departure in the direction of Yokohama.

“Q. You say that you sail west. Do you sail south of the Aleutians?

“A. We sail south of the Aleutians, yes.

“Q. That is the Mercator Course?

“A. Yes.

“Q. And then when you get beyond the Aleutians you pick up a great circle to Yokohama?

“A. We do, yes.

“Q. Was the route prescribed for this second voyage by the United States, that route?

“A. It was not.

“Q. What route was prescribed?”

Mr. Knudsen: Then we will skip over to the bottom of the next page. Do you object to my asking if it is more southerly?

Mr. Staring: I think I would like this in, if your Honor please.

Mr. Knudsen: All right.

Mr. Staring: (Reading.)

“Just a minute, I will object to it on the ground that it may still be restricted, the routes taken on these voyages. As to the exact route I [103] will call upon the Captain not to give that route.

Mr. Knudsen (Reading): “Generally speaking. I don’t want your exact latitude.

Mr. Staring (Reading): “You can say how many more miles it was on the route he took than the other one, but as far as latitude, and as far as

(Deposition of Robert Craig.)

courses, I will object to it on the ground of the restriction.

I will ask the Captain: Wasn't the route that you were to take—weren't you instructed that those were restricted courses and that you should not repeat the courses that you took?

Mr. Long: (Reading.)

"A. Yes, and I am not repeating any course.

Mr. Staring: "Yes, but I say you were advised as to that, were you? A. Yes."

Mr. Staring: "And during the conditions existing in Korea, those were considered quite secret, weren't they? A. They were."

Mr. Staring: "Have you been relieved from that obligation not to repeat those? A. No."

Mr. Ferguson: "Then I ask counsel to cooperate because I don't think the Captain would answer the question [104] under the circumstances."

Mr. Knudsen: "Do you object to my asking whether it is more southerly?"

Mr. Staring: "No, I don't, the number of miles, no, I don't object to that."

Mr. Knudsen:

"Q. Captain, was that route a more southerly route than the composite route?

"A. It was, yes.

"Q. Did you actually go to Yokohama?

"A. No, we didn't.

"Q. Where did you go?

"A. We went to Moji, Japan.

"Q. Do you know the distance from Seattle,

(Deposition of Robert Craig.)

“A. The log shows that the ship’s course was changed [107] at 0000.

“Q. On what day? A. On November 30th.

“Q. That is ship’s time? A. Ship’s time.

“Q. At that time how far out of Yokohama were you?

“A. From Yokohama I would judge from the position that the ship would be in when we altered course, that I was approximately 3 days from Yokohama.

“Q. When did you arrive at Moji?

“A. We arrived at Moji on December 6th, 1930.

“Q. Ship’s time? A. Ship’s time.

“Q. By my calculations, Captain—You check me on this, Captain—that is 6 days, 15 hours and 30 minutes after you received the message to divert, is that correct? A. That is right.

“Q. How long then, Captain, was the voyage prolonged by that diversion to Moji?

“A. By 3 days, 16 hours and 30 minutes.

“Q. When did you commence discharge at Moji, Captain?

“A. We commenced discharge on December 7th at 0830.

“Q. What time did you commence setting gear?

“A. We commenced setting gear, 5 gangs aboard commenced setting gear at 0800. [108]

“Q. And did the stevedores work the remainder of that day?

“A. They worked the remainder of that day, yes.

“Q. Who furnished the stevedores?

(Deposition of Robert Craig.)

“A. The M.S.T.S. arranged for them.

“Q. And did you discharge 2400 hours on December 8th?

“A. No. We commenced at 0830 on December 8th.

“Q. So there was no discharge from——

“A. Midnight.

“Q. ——0000 until 0830?

“A. That is right.

“Q. How long did you work?

“A. We worked right up until midnight, 2400 hours.

“Q. How long did you work on December 9th?

“A. On December 9th we worked from midnight until 1100, and then we worked from 1330 until 1430.

“Mr. Ferguson: Is that on December 10th?

“A. On December 9th, that is.

“Mr. Ferguson: All right.

“Q. Then what happened, Captain?

“A. Then we shifted out into the stream.

“Q. Why?

“A. Because the Harbor Master gave us instructions to move out there, and another ship was put into that berth.

“Q. Was that another M.S.T.S. ship? [109]

“A. I wouldn't know.

“Q. Was the Port of Moji controlled by the United States? A. It was.

“Q. By the M.S.T.S.?

(Deposition of Robert Craig.)

“A. By the United States authorities. I wouldn’t know who controlled it.

“Q. How long were you in the stream, or did you discharge at all while you were in the stream?

“A. No.

“Q. How long were you in the stream while the other ship was in your berth?

“A. We went back into berth on December 10 at 1600.

“Q. And commenced discharging when?

“A. And commenced discharging at 1930 on the 10th.

“Q. And when was discharge completed, Captain? A. 1015 on the 12th of December.

“Mr. Ferguson: Discharge was completed?

“A. Yes, discharge—I beg your pardon. Can we just review that December 11th. On December 11, at 2100, discharge was completed. And then, if my memory serves me right, the log book shows that there was a small amount of loading done from 1645, December 11, until 2100; there was a small amount of loading done. And from 0600 on December 12th until 1100 December 12th. [110]

“Q. There was loading done?

“A. Loading done. Now, that was no new cargo, because we had no new manifest, so I believe that that was cargo that had been shifted at the convenience of the longshoremen to get at cargo which they required.

“Q. How much of the cargo, approximately, was discharged at Moji?

“A. 2800 tons of cargo was discharged there.

(Deposition of Robert Craig.)

“Q. What was your total cargo?

“A. The total cargo was 9,365 tons, I believe.

“Q. Do you recall the cargo handling facilities at Moji? A. I do, yes.

“Q. How many berths were there at Moji?

“A. I couldn't tell you the exact number of berths at Moji, but Moji was one of the principal ports for the southern island of Japan, which is Kyushu, and had facilities for handling a good many ships.

“Q. What sort of stevedoring facilities were there available at the port?

“A. There was ample labor available, as far as I know, native longshoremen.

“Q. What sort of supervision did they have?

“A. The army supervised them, and while we were alongside the wharf discharging, native longshoremen [111] discharging the ship onto these lift-trucks with the skids which were operated by U. S. servicemen.

“Mr. Ferguson: Commonly known as fork lift-trucks?

“A. Yes, fork lift-trucks.”

Mr. Knudsen: (Reading.)

“Q. Were there facilities for unloading cargo into barges in the harbor?

“A. There were. It was commonly done.

“Q. Was the Moji Harbor congested?

“A. No, I wouldn't say it was congested. It is a big harbor, and it holds a lot of ships.

“Q. Based upon your observation of the facili-

(Deposition of Robert Craig.)

ties available that you actually saw and observed, could your entire cargo have been unloaded at Moji?

“A. It certainly could, according to the facilities I observed.

“Q. Captain, upon what do you base the statement you have just made that the ship could have been unloaded at Moji?

“A. On the fact that I know the facilities of the Port of Moji, having been in there quite a number of times.

“Q. Captain, is your opinion the same, if it were based upon your actual observation of the facilities that were there at this time in question, to wit, from December 7, 1950, through December 12, 1950? [112]

“Mr. Ferguson: I think the question is unintelligible. I object to it. It is improper.

“Mr. Knudsen: You may answer. Do you understand the question, Captain?

“The Witness: No. Could you just rephrase it?

“Q. (By Mr. Knudsen): Let me put it this way: Was there an M.S.T.S. representative at Moji? A. There was, yes.

“Q. Did you report to him and receive instructions from him? A. I did, yes.

“Q. How many times were you ashore from December 6th through the 12th, do you recall?

“A. I can't recall the number of times, but I was ashore and met him quite often because the office was just at the end of the wharf.

(Deposition of Robert Craig.)

“Q. Did you have an opportunity to observe the facilities for discharging vessels that were there at Moji at that time? A. Yes.

“Q. Based upon your observation of these facilities could this ship have been completely discharged at that time, using the facilities at hand?

“A. There was untold wharfage space, and if they [113] wanted there were plenty of barges in the stream, and they used the stream often in commercial discharge, so there was both facilities out in the stream and alongside for discharging the vessel.

“Q. Was there labor available?

“A. From my observation there was plenty of labor available.

“Q. Instead of completely discharging what instructions did you receive from the M.S.T.S.?

“A. I received instructions from the M.S.T.S., after having discharged 2800 tons of Air Force cargo to proceed to Kure and discharge the remainder of the cargo.

“Q. What time did you leave Moji?

“A. We left Moji on December 12th at 1532.

“Q. And when did you arrive at Kure?

“A. We arrived at Kure on December 13th, at 1041.

“Q. According to my figures, Captain, that is an elapsed time of 19 hours and 10 minutes, is that correct? A. That is correct.

“Q. Were you at that time ready to discharge?

“A. We were ready to discharge then.

(Deposition of Robert Craig.)

“Q. Did you advise the Harbor Master at Kure to that effect?

“A. Not in writing, but the Harbor Master came aboard when the ship came in, and he was told at that time that we were [114] ready.

“Q. When did discharge commence at Kure, Captain?

“A. Discharge commenced at Kure on January 12, 1951, at 1115.

“Q. What happened at 1115? When did they start to rig the vessel, Captain?

“A. They started to rig the vessel at 0900, and the first hoist was out of No. 3 hold at 1115.

“Q. According to my figures, from the time you arrived until they started to rig the vessel, there was a total elapsed time of 29 days, 22 hours and 20 minutes in the Harbor at Kure awaiting a berth, is that correct? A. I agree.

“Q. Was the Harbor Master expecting you when you arrived at Kure?

“A. Yes. The Harbor Master came aboard when we arrived there, and I asked him when he came aboard, I asked him when——”

Mr. Staring: We object to that as hearsay.

The Court: You changed that question?

Mr. Knudsen: Yes, I changed the question.
(Reading.)

“Q. Captain, who came aboard from the Harbor Master's Office when you arrived at Kure?

“A. One of the Harbor Master's assistants. His name [115] was Captain Robertson.

(Deposition of Robert Craig.)

“Q. And did he advise you when you were to be unloaded?

“A. I asked him when he expected to have the ship discharged, and he told me then that——”

Mr. Staring: No. We will pass that.

Mr. Knudsen: On the bottom of the page——

“Q. Would you please answer giving me the substance of Captain Robertson’s conversation with you as to when he intended to discharge the vessel?

“A. He didn’t tell me when he intended to discharge the vessel, but on my asking him when he expected that we would be fully discharged, he told me that he expected to discharge us by Christmas of 1950.

“Q. Skipping for the moment to the actual discharge, at what hour was discharge completed, taking the commencement on January 12 at 0900 when they started to set gear—and I refer you to January 19th, the log entry therefor.

“A. 0730 on January 19th.

“Q. According to my figures, Captain, that is an elapsed time for discharge at Kure of 6 days, 22 hours, 30 minutes; is that correct?

“A. I agree, yes.

“Q. Did you discharge the entire remainder of your cargo at Kure? [116] A. Yes.

“Q. How did the discharge progress with respect to hours worked during the day?

“A. They worked the full 24 hours—of course, taking time off for meals when they were discharging.

(Deposition of Robert Craig.)

“Q. Did they work 7 days a week?

“A. They worked continuously from the time, except for a period when they had to take us back to the stream, if I remember right.

“Q. A short period was that?

“A. Yes. On January 14th they took us back out into the stream from the wharf.

“Q. How long was the discharge interrupted?

“A. They ceased work on that day, January 14th, at 1200, and in the stream they resumed discharging us at 1550.

“Q. Was that overside into barges then?

“A. That was into barges.

“Q. And when did you return to your berth?

“A. We completed discharge out in the stream at 0730 on the 19th.

“Q. Was the discharge commenced in berth, Captain, and then completed in the stream overside into barges? A. Yes.

“Q. And it was completed at 0730 on January 19th? [117] A. Yes.

“Q. When did you sail?

“A. We sailed on January 19th at 1212.

“Q. Now, Captain, going back to the period in which you lay at anchor in the stream awaiting a berth at Kure for discharge, you say you were first advised by Captain Robertson that you would be unloaded by Christmas. Thereafter did you inquire, make any inquiries of the Harbor Master for orders for discharge?

“A. I went ashore almost every day to the

(Deposition of Robert Craig.)

Harbor Master's office, and every time I was in his office I asked him when he was going to start discharging us.

"Q. Now, did Captain Robertson advise you why you were not discharged for the period that you lay in the harbor?

"A. Well, he told me that there were other ships that they wanted the cargo from right away.

"Q. Did you receive any further advice from anyone in the Harbor Master's office as to why you were not discharged?

"A. Well, there was an assistant there, a Master Sergeant, I believe he was, and I had a talk with him one day in the office there, and he—he did tell me that they were making a new ammunition dump and that we wouldn't be discharged until that was ready to receive the ammunition. [118]

"Q. This was a Master Sergeant of the United States Army? A. Yes.

"Q. Was this Captain Robertson's assistant?

"A. He was in Captain Robertson's office, yes.

"Q. And do you recall his name?

"A. No, I can't recall his name.

"Q. Was he is Nisei Japanese?

"A. He was a Nisei Japanese. That is the only identification I have of him.

"Q. Do you know who the Harbor Master was?

"A. He was an Army Colonel, but I don't know his name.

"Q. Of the United States Army?

"A. I don't recall his name. Yes.

(Deposition of Robert Craig.)

“Q. Did you ever meet him?

“A. I did. I met him once.

“Q. Did he advise you why you were not being discharged?

“A. He never advised me as to why. I asked him but I could never get any satisfactory answer.

“Q. Captain, when you were finally discharged were you advised why you were being discharged?

“A. Well, prior to discharge there was a civilian, I believe he was the United States Ammunition Inspector for that area, came aboard, and it was from him that I [119] first received information that they were going to start discharging me, and he came aboard, I think it was about January 10th, and told me that he had received—he told me that he had received orders from the Logistics Command in Yokohama to get the ship discharged as quickly as possible and get her back to Seattle as the charter had expired.

“Q. Was this man an American?

“A. Well, I wouldn't know.

“Q. Well, I mean, he was not a Japanese?

“A. No. he was not a Japanese.

“Q. He was an employee of the United States?

“A. He was, yes.

“Q. During this approximately 30 days, Captain, did you receive orders for discharge prior to the time that you were actually discharged?

“A. Yes.

“Q. Who gave you your final orders for discharge, your instructions?

(Deposition of Robert Craig.)

“A. The first knowledge I had, as I have said already, was from this gentleman who came aboard; and then someone from the Harbor Master’s office came out and told me to have the ship ready for going alongside to discharge, and they would send a pilot out.

“Q. Prior to that time had you received any other instructions for discharge? [120]

“A. When I was over in the Harbor Master’s office, I can recall that twice I was told to have the ship ready, that they were going to take her alongside, and then these orders were canceled.

“Q. You do not recall the approximate dates of those advices?

“A. No, I don’t remember now—It is so long ago.

“Q. How many ships were in the harbor when you arrived at Kure, do you recall?

“A. I could not state a definite number, but there were—well, to hazard, I would say 4 or 5 ships in the harbor.

“Q. Were those vessels unloaded before the SS Lake Sicamous was unloaded?

“A. All I can say is that they all left the harbor before I did.

“Q. How many vessels came into the harbor while you were at anchorage?

“A. Again as to numbers I couldn’t be definite.

“Q. To the best of your recollection.

“A. But there were other vessels. I would say

(Deposition of Robert Craig.)

there were two or three came in each week while we were at anchor there.

“Q. Were any of those vessels unloaded prior to the time that you were discharged? [121]

“A. They were, yes.

“Q. How many of them, do you know?

“A. No, I don't know that.

“Q. Do you recall how many vessels were still in the harbor when you were given a berth for discharge?

“A. I can't recall the number, but there were vessels out at anchor, I know.

“Q. Were vessels discharged in turn at Kure?

“A. There didn't seem to be any regular order of turn whatsoever.

“Q. Do you know upon what basis vessels were discharged?

“A. The only thing I can say is that I was told that vessels which had just come in had cargo which was urgently required, and they took them before they took me.

“Q. Now, how many berths were available for unloading vessels at Kure?

“A. To my recollection, there were four berths.

“Q. And they—would they accommodate four ships? A. I believe they would.

“Q. Did they also discharge vessels into barges?

“A. They did, yes.

“Q. What stevedoring facilities were available?

“A. They had native longshoremen doing the actual discharging. [122]

(Deposition of Robert Craig.)

“Q. And who supervised them?

“A. Under the supervision of army personnel.

“Q. Do you have an opinion, based upon your observation, your actual observation while in port at Kure as to how long it would have taken to discharge your vessel if it had been discharged in its regular turn?”

Mr. Staring: Skip that.

Mr. Knudsen: (Reading.)

“Q. First, Captain, I ask you if you have an opinion. A. Yes, I have an opinion.

“Q. What is that opinion?

“A. In my opinion the vessel should have been discharged within seven days from the time of commencing discharge.

“Q. And do you have an opinion as to how long you would have waited for a berth if you had been given a berth in turn, in your regular turn?

“A. In my recollection there were two ships in the harbor that went into the wharf after I arrived, and on that basis I would say that I may have had to wait six or seven days and then gone alongside to discharge.

“Q. Captain, in case I haven't made it clear now, the Army had its own discharge facilities and harbor facilities there at Kure, is that correct?

“A. Yes. [123]

“Q. Was there an M.S.T.S. representative there? A. Not stationed at Kure, no.

“Q. Did any M.S.T.S. representative contact you at Kure?

(Deposition of Robert Craig.)

“A. Not until late in January when I got word to start discharge, and then the representative came down from Kobe.

“Q. And did he give you any instructions at that time?

“A. He gave me instructions that after discharge I was to go back to Seattle.

“Q. Did he give you any instructions regarding refueling or taking on supplies?

“A. Yes. I was instructed that after discharge I had to go around to Kobe and there refuel and take on the necessary ship's stores, food, and so forth, ship's supplies sufficient to take me back to Seattle.

“Q. And when did you depart from Kure to Kobe—Directing your attention, Captain, to the January 19th log.

“A. We left Kure at 1212 on January 19th for Kobe.

“Q. When did you arrive at Kobe?

“A. We arrived at Kobe on January 20th, at 1840.

“Q. Captain, by my figures that is 1 day, 6 hours and 28 minutes elapsed time, is that correct?

“A. That is correct. [124]

“Q. And did you refuel at Kobe?

“A. We refueled at Kobe.

“Q. How long did that take?

“A. We commenced refueling at 2300 hours on January 20th, and completed loading fuel at 0045.

“Q. On what date? A. On January 21st.

(Deposition of Robert Craig.)

“Q. Now, Captain, when did you depart from Kobe?

“A. We left Kobe on January 21st, at 1230.

“Q. And what did you do in Kobe other than take on fuel?

“A. We took on ship's stores at Kobe.

“Q. Where did you get your fuel?

“A. From a Japanese tanker, which came alongside and supplied us with fuel oil.

“Q. Do you know where that tanker had come from?

“A. Well, when we left Kure she was in Kure and followed us around.

“Q. Why didn't they refuel you at Kure, Captain? A. I wouldn't know that.

“Q. Did you receive any instructions from the M.S.T.S. representative at Kobe?

“A. I got my instructions in Kobe to return to Seattle, Washington.

“Q. Do you know, Captain, what the steaming time would [125] be from Kobe to Yokohama at the normal speed of the SS Lake Sicamous?

“A. Well, I should say about 15 hours.

“Q. When did you depart from Kobe?

“A. We left Kobe at 1230 on January 21st, 1951.

“Q. When did you arrive at Seattle?

“A. At 0715 on February 10th.

“Q. According to my calculations, Captain, that is a total elapsed time for the second voyage, from the commencement of the second voyage to rede-

(Deposition of Robert Craig.)

livery of 122 days, 2 hours, 24 minutes, is that correct?"

The Court: That is 122 days?

Mr. Knudsen: And 2 hours and 24 minutes.

The Court: That is from what point to what point?

Mr. Knudsen: That is from the commencement of the second voyage to redelivery.

The Court: The second voyage commenced where?

Mr. Knudsen: Commenced in Seattle. That is to say, your Honor, if I may make an explanatory comment——

The Court: Well, I thought this Master had been talking about one voyage, the voyage that was from November some time all through this thing.

Mr. Knudsen: That is right, your Honor. That is [126] the second voyage.

The Court: Well, that is the voyage he is talking about, is that right?

Mr. Knudsen: Yes, your Honor.

The Court: Beginning when? November what?

Mr. Knudsen: The conclusion of voyage one, if the Court please, on page 20 of the deposition, was October 14 at 0536 G.M.T., and the way the Captain figures is that the conclusion of one voyage is the commencement of the next under these charters.

The Court: But the only things you are concerned with here in this deposition up to this time are the various matters and things that happened

(Deposition of Robert Craig.)

as represented in this deposition concerning the second voyage, is that right?

Mr. Knudsen: Yes, although we did briefly cover the first voyage, that is, for example, your Honor, to show reasonable dispatch on the first voyage, what reasonable dispatch is.

The Court: When did this second voyage begin according to counsel? When is it? November what?

Mr. Staring: The second voyage officially began October 14th, but the ship actually departed, took her departure, from Port Angeles on November 10th. [127]

The Court: November 10th, is that right?

Mr. Knudsen: Yes, that was after she was loaded, of course.

The Court: Well, when do you claim that the voyage began on October 14th?

Mr. Knudsen: On October 14 at 0536 G.M.T.

The Court: And ended when? What date?

Mr. Knudsen: Ended February 12.

The Court: That is when it arrived in Seattle?

Mr. Knudsen: That is redelivery, February 12 at 2400.

The Court: That is when it arrived at Seattle from Kobe?

Mr. Knudsen: No. That is when she was redelivered. She was redelivered two days after she arrived.

The Court: Well, then——

Mr. Knudsen: The arrival time in Seattle was

(Deposition of Robert Craig.)

0715 on February 10th and redelivery was made on February 13th at 0800 G.M.T.

The Court: Then on February 12th——

Mr. Knudsen: On February 12th, it was 2400 P.S.T.

The Court: The date of redelivery then is the 12th. Do you both agree on that?

Mr. Knudsen: Yes. [128]

Mr. Staring: Yes.

Mr. Knudsen: The only reason I made the changes to G.M.T. was because we had a conversion from daylight to standard.

The Court: Where did you read that?

Mr. Long: From the bottom of page 62 to the top of page 63, your Honor.

The Court: The proceedings today will recess there and we will begin this tomorrow morning at ten o'clock.

The Court is adjourned until tomorrow morning at ten o'clock.

(At 4:00 o'clock p.m., Wednesday, August 3, 1955, proceedings recessed until 10:00 o'clock a.m., Thursday, August 4, 1955.) [129]

August 4, 1955, 10:00 A.M.

The Court: I wish to proceed with the reading of the deposition in the case on trial.

Mr. Knudsen: If the Court please, we will resume on the bottom of page 62, the last question on that page.

(Deposition of Robert Craig.)

The Court: You may proceed. Will you repeat the question even if you have already read it?

(Whereupon Mr. Knudsen continued to read the questions and Mr. Long resumed the stand and continued to read the answers.)

Mr. Knudsen: (Reading.)

“Q. According to my calculations, Captain, that is a total elapsed time for the second voyage, from the commencement of the second voyage to redelivery of 122 days, 2 hours, 24 minutes, is that correct? A. I agree with that.

“Q. And that makes a total elapsed time from delivery of the vessel to redelivery of the vessel under the charter of 192 days and 13 hours, is that correct? A. That is correct.

“Q. Captain, will you waive your signature to this [130] deposition? A. I will, yes.”

Mr. Staring: If your Honor, please, Mr. Cushman would be willing to take the stand and relieve Mr. Long on cross-examination.

Mr. Long: It is quite all right with me. It is quite agreeable to me to continue.

The Court: We will let Mr. Long continue.

(Whereupon, on cross-examination, Mr. Staring read the questions and Mr. Long continued to read the answers.)

(Deposition of Robert Craig.)

Cross-Examination

Mr. Staring: Let us skip this preliminary over to page 64, the second question on page 64. (Reading.)

“Q. Captain, in the log books, when you make a mistake in the logs, do you erase them, or do you write over them?

“A. The officer had instructions to score it and write in the amended——

“Q. You mean to erase or just to scratch a line through it? A. Scratch it. [131]

“Q. Scratch a line through it? A. Yes.

“Q. They are not allowed to erase?

“A. No, they are not supposed to.

“Q. I want to show you on October 20th an illustration there and ask you if there is an erasure of the word and “gangs” is written over it. Doesn’t that look to you like it has been erased and written over?

“A. That certainly looks like a smudge there or something.

“Q. Yes, I just wanted to get your opinion on it.

“A. Yes, it is a smudge.

“Q. And that is in violation of your directions?

“A. Yes.

“Mr. Knudsen: Did you say it was an erasure, Captain?

“A. No, I wouldn’t know.

“Mr. Ferguson: It looks like one, he said.

“A. I said it looks like a smudge there.

(Deposition of Robert Craig.)

“Q. Now, do you sign the log book on each page?

“A. Not the scratch log book.

“Q. The rough log?

“A. Not the rough log, no.

“Q. It is only signed by the officers who make the entries? [132] A. That is right, yes.

“Q. Now, Captain, how long have you been going to sea, did you say? A. About 16 years.

“Q. And during that time you sailed during the second war, didn't you? A. Yes, I did.

“Q. And in what oceans did you sail during the war?

“A. I sailed during the war on the Atlantic, and through the Indian Ocean over to Bombay. That was my main——

“Q. You sailed on the Pacific and into Oriental ports during the war?

“A. Not during the war.

“Q. And immediately after the war?

“A. Not immediately after the war.

“Q. In 1945?

“A. Not until I came out to Canada to join the Western Canada Steamships.

“Q. Well, in these East Coast ports during the war, did they have priorities in berthing vessels in accordance with the needs of the cargo aboard, when you were sailing during the war?

“A. I wouldn't know.

“Q. Do you know whether or not, for instance, that a vessel discharging at a wharf would be taken away from [133] her discharging at the wharf to

(Deposition of Robert Craig.)

allow a reefer to come in, for instance? Do you know what I mean by 'reefer'?

"A. Yes, a refrigerator ship. I wouldn't know.

"Q. You didn't know anything about those priorities? A. No.

"Q. Now, how many times have you been in the Ports of Yokohama, Kobe, Moji and Kure?

"A. I couldn't state a definite number of times without referring to log books.

"Q. I mean outside of these log books.

"A. Yes, I know. I am trying to recall.

"Q. Well. if you can't recall that right now, let me ask you then: Were you ever in the Port of Kure prior to the time you were there in 1950 on the Lake Sicamous?

"A. I never was in the port of Kure before.

"Q. Were you ever in the Port of Moji, Japan, prior to the time you were there in 1950 on the Lake Sicamous? A. I was, yes.

"Q. How many times?

"A. I can't remember the number of times. All I know is that I have been there two or three times.

"Q. Were you there during any times prior to October, 1950, where war conditions were existing at the vicinity, such as the Korean hostilities, prior to October of 1950?"

Mr. Knudsen: I waive—— [134]

The Court: Start after the discussion.

Mr. Long: Yes, your Honor. (Reading.)

"A. Not in Moji.

"Q. Now, when did the Korean hostilities which

(Deposition of Robert Craig.)

were existing in October of 1950 when you were in Moji, and in December when you were in Kure, start? A. I beg your pardon.

“Q. I will reframe it for you. When did the Korean hostilities start in 1950, if you recall?

“A. 25th of June, 1950, I believe is when the Korean War started.

“Q. That was June—— A. 25th.

“Q. ——1950?

“A. 1950, if my memory serves me right.

“Q. And that was prior to the time that the charter of the Lake Sicamous was made to the M.S.T.S., wasn't it? A. Yes.

“Q. Because the charter, as I recall, was effective as of August 4, wasn't it? A. Yes.

“Q. Now, when the charter was made and you got your directions to go there to load, you understood that you were to load ammunition to be transported to the Far East for the United States, didn't you? [135] A. Yes.

“Q. And this ammunition was to be used by the United States and their allies in this conflict, didn't you? A. Yes.

“Q. You also knew that there were various types of ammunition which would be loaded on your ship, didn't you? A. Yes, I did.

“Q. Now, when you went to load the ammunition you realized that that ammunition had to have careful stowage ashore, didn't you? I mean they couldn't leave it on the docks, is that correct?

“A. Quite right.

(Deposition of Robert Craig.)

“Q. Have you ever seen the vetments in which they put the railroad cars in which ammunition is being transported?

“A. No, I never examined them.

“Q. Underground vetments where the cars are run in and run out and loaded?

“A. No, but I have seen them going through the Ordnance Depot at Bangor, but I have never been in there.

“Q. You also know that under the regulations, for the protection of both your ship and the surrounding community, that they could not have too much ammunition congregated at any special point, didn't you? In other words, there were a certain number of cars, or a certain amount that could be set on the dock and no more? [136]

“A. Well, I was not informed of any regulation.

“Q. You did not know about that, did you?

“A. No.

“Q. You did not realize that there was a great danger in that situation if they got too much?

“A. Well, I realized there was danger, but I was not informed of any regulations.

“Q. Well, you have heard, of course, of the Port Chicago Explosion Case, haven't you, in California, where two ships blew up when unloading ammunition? A. No, I can't recall.

“Q. So, as far as the reasons causing delay in the loading and the discharge of ammunition, you personally don't know what the causes might be, do you? A. I don't know, no.

(Deposition of Robert Craig.)

“Q. All right. Now, you were loading at Bangor. Was that an ammunition depot?

“A. It was, yes.

“Q. You loaded at Bangor on the first shipment? A. On the second shipment.

“Q. Yes, on the second shipment.

“A. On the second shipment.

“Q. Were you unduly delayed in loading your first shipment; or do you figure that you loaded that in about the regular time? [137]

“A. The first shipment, I reckon, was loaded in about the regular time.

“Q. About the regular time. No complaint about that one, is there? A. No.

“Q. And in regard to the first shipment, when you unloaded it, there was no delay unduly in the discharge of that cargo, in the first shipment?

“A. No.

“Q. Now, when you left the port, going over to the Far East, you received instructions that you might receive radio messages to divert your course at some time, to some particular point, or maybe different points, is that correct?

“A. As far as I can recall, the routing instructions I was given, gave me a reference point to which all instructions would be referred.

“Q. Yes, that is right. And then they gave you the code, didn't they, at that time, a secret code?

“A. Yes.

“Q. And you kept that secret code locked up safely in the safe, didn't you? A. Yes.

(Deposition of Robert Craig.)

“Q. And no one else had access to that except yourself? A. That is right. [138]

“Q. Did you allow the First Officer to have it?

“A. No, the First Officer did not have it.

“Q. Those were the same type of instructions that you received when you were in the Atlantic at certain times, when you were operating during the war; similar instructions to that?

“A. Somewhat similar.

“Q. Yes, somewhat similar. I mean you had a code. A. Yes.

“Q. And you locked it up in the safe?

“A. Yes.

“Q. And you had a letter of instructions which you had to seal? A. Yes.

“Q. And you put it in the safe, and you could not open it until a certain specified date, is that right? A. Yes.

“Q. And you did not know where you were going until you opened that letter at approximately a certain point, and then your course was changed, is that correct? A. Yes.

“Q. Yes. Now, Captain, did you have a copy of the charter party, too? A. Yes.

“Q. So you familiarized yourself with the [139] charter party to know what you should do and should not do, didn't you? A. Yes.

“Q. And you familiarized yourself with the Liberties Clause in the War Risk Addendum to the charter, didn't you? A. Yes.

“Q. For the purpose of refreshing your——”

(Deposition of Robert Craig.)

Mr. Staring: We needn't read that.

Mr. Knudsen: Your Honor, for the record I will renew my objection now to any question regarding the Liberties Clause in the charter party on two grounds: (1) It is beyond the scope of the direct examination; and (2) The Liberties Clause is completely irrelevant to this action since it gives the owner certain liberties, gives him the privilege to follow certain instructions and do certain things without being guilty of a breach of charter party. We are here dealing with an alleged breach by the charterer and not the owner, and the Liberties Clause is completely irrelevant to this particular action.

Mr. Staring: We may pass over this part of the examination.

The Court: Do you wish to withdraw the question? I wish this deposition had numbered lines like the Rules require. I wish you gentlemen in the future [140] would request the reporter to use numbered lines.

Where do you want to omit?

Mr. Staring: I will withdraw the last question on page 74.

The Court: That is: "For the purpose of refreshing——"

Mr. Staring: "For the purpose of refreshing——"

The Court: Withdraw that and the answer of the witness to that, and then you continue to withdraw from consideration by the Court down to what

(Deposition of Robert Craig.)

line and on what page? The page on which the beginning of this matter just referred to occurs is 74.

Mr. Staring: I would like to withdraw over to page 76, the first answer of the witness.

The Court: You may do that. It is withdrawn, and the Court will disregard it. I need to locate that first. Is it in the middle of the page?

The Staring: The first answer of the witness on page 76 is on the fourth line. It is: "I read the whole charter party through."

The Court: Is that what you wish to begin reading?

Mr. Staring: Yes.

The Court: All right. You may proceed.

Mr. Staring: Will you resume there, Mr. [141] Long?

Mr. Long: Yes. (Reading.)

"A. I read the whole charter party through.

"Q. And including the War Risk Addendum Clause, didn't you? A. Including that.

"Q. So if that clause is incorporated in the addendum clause, you read it?

"A. If it was in the charter party as stated, yes.

"Q. Well, you understood, did you not, that you were to comply with all orders that were given to you? A. In the charter party.

"Q. As to any port or place which you should go when you got out to this point you have referred to.

"A. Well, my understanding is that I was under

(Deposition of Robert Craig.)

the orders of the charter from the time that I came under the charter.

“Q. Surely. And you understood that in going into these places such as Kure, and so forth, and Moji, that was a port to which you were authorized to go, if required, by the United States Government officials or officials of the Allied Nations, didn't you?

“A. I understood that I would go wherever instructed.

“Q. Yes. Now, let us get into the harbor of Kure. You said there were some other vessels in there. Now, do you remember the SS Hunter Victory, whether she was [142] in there at the time.

“A. I can't swear to any.

“Q. That is in December and January of 1950 and 1951?

“A. I couldn't swear to the names of any there.

“Q. Well, do you remember a vessel such as the Clarksburg Victory that got in there in December; do you remember her?

“A. The name sounds familiar.

“Q. The Earlham Victory.

“A. I can't recall that name.

“Q. Well, do you remember the Lynn Victory?

“A. No.

“Q. Do you remember the Olympic Pioneer went in in December and out in January?

“A. No, I can't remember the names of them.

“Q. Do you remember the Hibbing Victory went in in December and came out in January?

(Deposition of Robert Craig.)

"A. No.

"Q. Well, do you remember the Marquette Victory? A. I remember the Marquette, yes.

"Q. You remember her being in there?

"A. Yes.

"Q. You remember she went in there in December and did not come out until January?

"A. No, I couldn't definitely state. [143]

"Q. But you remember seeing her in there?

"A. I remember seeing her, yes, I remember her.

"Q. Now, do you remember the Berea Victory?

"A. Yes, I remember that name.

"Q. Do you remember her?

"A. I remember that name, yes.

"Q. And she was in there in December and came out in January?

"Mr. Knudsen: Are you asking the Captain if he remembers whether or not she went in in December and came out in January?

"Mr. Ferguson: I will ask him.

"Q. Do you remember her going in in December and that she went out in January?

"A. I can't remember when they came in and when they went out.

"Q. Do you remember her being in there before you went in there, when you came into Kure?

"A. I could not state definitely when she was in there.

"Q. You do not recall that either of those vessels, that you noticed them after you came in, do you? A. No.

(Deposition of Robert Craig.)

“Q. Now, when you were being advised, given any advice relative to staying in Kure, or when you were going to [144] get out of Kure, did I understand you to say that you were told that certain ammunition had to be out and they had to take that first before they could take other ammunition?

“A. I was told that there was certain ammunition, and I was told that the Air Force ammunition was what they wanted out of the ships.

“Q. Do you recall any unusual incidents, hostilities along in November and December of 1950?

“A. About the time I was in Moji there was an exacuation of Hungnam.

“Q. And they were needing ammunition very badly then, weren't they?

“Mr. Knudsen: If you know, Captain.

“A. Well, were you told they were—for the Air Corps?

“A. I was told they wanted ammunition for the Air Corps, yes.

“Q. Now, at Moji, did you say that Moji was not congested when you were in there, having discharged 2800 tons of ammunition?

“A. I can't remember any congestion.

“Q. You can't remember any congestion?

“A. Any congestion, no.

“Q. Do you remember whether there was a heavy outloading of ammunition in Moji at the time you were there? [145]

“A. No, I can't remember.

“Q. You know what I mean by 'out-loading'?

(Deposition of Robert Craig.)

"A. Yes, loading into other vessels.

"Q. And sending it out? A. Yes.

"Q. You can't remember that? A. No.

"Q. Do you remember of any number of ships being sent from Moji down to Kure?

"A. I was not aware of what ships were sent down to Kure from Moji, no.

"Q. Do you know that there were some vessels outside of your own sent from Moji to Kure?

"A. Not to my knowledge, no.

"Q. You don't recall of any? A. No.

"Q. At Moji did you discharge all of your Air Force cargo?

"A. Yes, all of the Air Force cargo.

"Q. At Moji? A. At Moji, yes.

"Q. Your other cargo, without describing it, was for the general army, was it?

"A. It was, yes.

"Q. Land forces? [146]

"Q. Now, did you write up a voyage abstract to be given to the government? A. Yes.

"Q. And in that you gave the hours and voyage details, did you? A. Yes, we did.

"Q. And that was a correct abstract, was it?

"A. It was, yes.

"Q. I will have you look at this and ask you if that is a synopsis, or the synopsis that you gave of the charter party? A. Yes, that is."

Mr. Staring: May I inquire whether that synopsis is attached as an exhibit to the Court's copy of the deposition?

(Deposition of Robert Craig.)

The Court: (Handing original copy of deposition to Mr. Staring.) Will counsel look at the original number of the deposition and see if he can answer his own question?

Mr. Staring: It is so attached, your Honor.

The Court: Well, do you wish to have it identified by this testimony as an exhibit in this case?

Mr. Staring: Yes, your Honor, I do.

The Court: It should then be detached and by the Clerk given a new number in sequence with the [147] other exhibits.

Mr. Long: Would that be Exhibit 19?

The Clerk: Libelant's Exhibit No. 19.

(Voyage abstract marked Libelant's Exhibit No. 19 for identification.)

The Court: By what number or identification mark was that previously known if you can now state it, Mr. Staring, agreeably to other counsel?

Mr. Staring: It was put into the deposition as Government Exhibit No. 1 for identification.

The Court: Is the word "Government" a part of the nomenclature of the identity or identifying marks of the exhibit in the deposition?

Mr. Staring: In the deposition it is stated in that way. It is Government Exhibit No. 1 for identification.

The Court: Let the record show that what previously was referred to as Government Exhibit 1 in connection with the Craig deposition is now marked by the Clerk as Libelant's Exhibit 19.

(Deposition of Robert Craig.)

Mr. Knudsen: This is a respondent's exhibit, not libellant's.

The Court: What was it called in the deposition itself? [148]

Mr. Staring: I think we can call it an abstract.

The Court: I want to know what the deposition says it was by name or reference. What are the reference characters?

Mr. Staring: It was Exhibit 1 to the deposition, and it was referred to as a "voyage abstract," your Honor.

The Court: Then the word "Government" is not part of the former reference, is that right?

Mr. Staring: Well, yes, it is. That was referred to as Government Exhibit 1.

The Court: And the respondent called it that in the deposition or did the witness call it that or did anybody interrogating the witness ask that it be known as Government Exhibit 1?

Mr. Staring: I do not see that any one asked that it be known as Government Exhibit 1.

The Court: Where did any one call it Government Exhibit 1?

Mr. Staring: In page 83, the reporter in parenthesis has shown that he identified it as Government Exhibit 1 for identification.

The Court: Will you admit that is the way it was referred to in the deposition, Mr. Knudsen?

Mr. Knudsen: Yes, your Honor. [149]

The Court: Then Mr. Staring's statement is correct.

(Deposition of Robert Craig.)

The Clerk: It will be marked—re-marked—Respondent's Exhibit A-1.

(Voyage abstract re-marked Respondent's Exhibit A-1 for identification.)

The Court: Mr. Staring is examining this witness. Why would it be referred to as a Government exhibit? You are going to offer it in evidence, are you not or are you?

Mr. Staring: Yes, your Honor.

The Court: Well, let it be marked Libellant's Exhibit 19.

Mr. Knudsen: If the Court please——

The Court: Has it already been marked?

(The Clerk shows the exhibit to the Court.)

The Court: The Clerk has already marked this as Respondent's A-1.

You may proceed.

Mr. Staring: I should like to offer that in evidence at this time.

Mr. Knudsen: No objection.

The Court: Admitted. [150]

(Respondent's Exhibit No. A-1 received in evidence.)

Mr. Staring: At the bottom of page 83, Mr. Long.

Mr. Long: Yes, I have it.

Mr. Staring (Reading):

(Deposition of Robert Craig.)

"Q. Now, in the log book for September 20th I note that up here the entry is: 0800: the entry: 'Work ceased to comply with army blackout.' '0010, all clear; work resumed.'

"Were there many of those blackouts at that time while you were in Kure?

"A. That was in Mukilteo, wasn't it?

"Q. Well, whether it was in Mukilteo, or not—I will reframe the question, though: That was in Buckner Bay, Okinawa?

"A. Buckner Bay, Okinawa, yes.

"Q. Now, did you have any blackouts over in Korea when you were there?

"A. No, I can't remember any.

"Q. But you were always under orders to wait for blackout signals if they were given so you would stop work?

"A. If there would be any local instructions.

"Q. That would come from local [151] instructions? A. Yes.

"Q. Now, did you know Colonel Sanderson in Kure?

"A. I don't know the name of any of these gentlemen. I only know that I met a Colonel, but I couldn't identify him by name.

"Q. Well, did they have a Port Commander at Kure? A. They had, yes.

"Q. And he was a Colonel? A. Yes.

"Q. And the Port Commander there was in command of the whole port, wasn't he?

"A. Yes, as far as I know.

(Deposition of Robert Craig.)

“Q. And all vessels had to take their directions from him? A. Yes.

“Q. Is that correct? A. Yes.

“Q. Or his office? A. Yes.

“Q. Now, would you say that that Colonel is the one that talked to you at all, came aboard your vessel?

“A. I can't remember the Colonel ever having been aboard.

“Q. Yes. Now, do you remember a Colonel Blust being stationed in Kure? [152]

“A. I say I can't identify these gentlemen by name.

“Q. In other words, you can't identify any of the men that talked to you about the discharge?”

Mr. Knudsen: I object to that. There is no showing that these people ever talked to him.

Mr. Long: The answer is on page 86. I think I have an answer to read. (Reading.)

“A. The person I mainly dealt with was the Assistant Harbor Master, Captain Robertson.

“Q. Captain Robertson?

“A. Yes, Captain Robertson.

“Q. And he was in the Army, was he?

“A. Yes, in the Harbor Master's office there.

“Q. Of course, you don't remember his initials—Robertson?

“A. No. I remember Robertson's name.

“Q. Now, do you recall a Major Scales—you don't recall a Major Scales either, do you?

“A. No, I can't recall him.

(Deposition of Robert Craig.)

"Q. How would you describe this individual that you said came aboard and informed you that the vessel would have to go right on back to Seattle as early as possible?

"Q. Came aboard at what time?

"A. While you were in Kure, when you were discharging. Well, let us go back over it then. Now, did some individual [153] advise you that the charter party had ended, and the vessel was to go back? A. Yes.

"Q. And who was that individual?

"A. I can't remember his name, but I know that he was the U. S. Ammunition Inspector in that area.

"Q. That is at Kure? A. At Kure.

"Q. And was he a civilian or in uniform?

"A. He was in civilian——

"Q. Civilian clothes? A. Yes.

"Q. Can you describe him? Was he a tall man?

"A. He was fairly tall, yes, I would say about 5/10, 5/11.

"Q. Did he wear a mustache or no mustache?

"A. I can't remember.

"Q. Was he a big, heavy-set man, or was he skinny?

"A. He was not heavy-set. I would say just normal proportion to his height.

"Q. Weighed about 190, 200 pounds?

"A. I would say about 190.

"Q. About 190 pounds. Did he have any special appearance—gray hair?

(Deposition of Robert Craig.)

“A. I can't remember. I think his hair was kind of [154] sandy.

“Q. I am trying to get the best description I can because we want to locate him, Captain.

“A. Yes, yes.

“Q. You say he had kind of sandy hair.

“A. If my memory serves me right, I am pretty sure the Colonel must know him.

“Q. And what was his title, as you recall it?

“A. I don't know his title, but I know that in most of the Ordnance Depots you had these men. We had one, I remember, at Mukilteo, too, an Ammunition Inspector. But I don't know his official title.

“Q. You didn't receive any orders—you didn't receive orders from this man, though, did you?

“A. No, no orders.

“Q. They all came from the Command?

“A. From the Command, yes.

“Q. Now, outside of those that you spoke of, did you have any contact with any other port authorities? A. None in Kure that I can remember.

“Q. Did you have any communications with Western Canada Steamship Company, Limited, that is the owners of the ship? A. Yes.

“Q. How were they received—by wire? [155]

“A. Yes. I sent a telegram to my owners just after the new year, around January 3rd.

“Q. Advising them of your delay?

“A. Advising them of my delay and stating that

(Deposition of Robert Craig.)

it appeared to me that my stay in Kure was indefinite.

"Q. Now, did you get any reply? Where is that telegram? I mean, did you keep a copy of that telegram?

"A. No, I didn't keep a copy. That was sent through the Japanese Post Office there.

"Q. Oh, you sent that by mail?

"A. Through the Japanese Post Office. They sent wires there.

"Q. Well, that would be by mail?

"A. Yes, through the Post Office.

"Q. Did you send any radio messages?

"A. No.

"Q. Did you keep a copy of that message you sent to them? A. No, I didn't keep a copy.

"Q. Now, did you receive any messages from them? A. No.

"Q. From the owners? A. No.

"Q. Not during the entire time you were out there? A. No. [156]

"Q. Neither by radio or by mail?

"A. No. Not as far as I can remember.

"Q. Did you keep the manifests; did you make out the manifests or were they made up by the Army?

"A. They were made up by the Supercargo, I believe, employed by the Army.

"Q. Was a copy given to you?

"A. Yes, I believe I had a copy.

"Q. Did you give that to the owners?

(Deposition of Robert Craig.)

“A. I believe that would be kept in the ship’s files; I can’t recall.

“Q. You don’t recall whether you gave it to the owners? A. No, I can’t recall.

“Q. And all the manifest had was a list of the cargo, wasn’t it, aboard describing it?

“A. I can’t remember now.

“Q. The vessel was not overloaded, was it?

“A. Oh, no, no.

“Q. And it was properly stowed, wasn’t it?

“A. It was properly stowed and properly loaded, yes.

“Q. You had no difficulty about the cargo and the stowage? A. No, none at all.

“Q. The stowage plan, that just was a plan showing [157] where the cargo was stowed in the vessel?

“A. Yes.

“Q. Was there any criticism of that plan of stowage? A. No criticism whatsoever.

“Q. It was all right? A. Yes.

“Q. And it met with your approval in every respect? A. Yes.

“Q. You didn’t have any damage to the ship——

“A. No.

“Q. ——caused by the cargo?

“A. No, not at all.

“Q. Or by the loading, did you? A. No.

“Q. Now, you said something about, on the second voyage, that there was a delay in loading the vessel? A. Yes.

“Q. Now, was there any cargo alongside of the

(Deposition of Robert Craig.)

vessel at times when they were loading, when they were loading, that should have been loaded, or was the delay by reason of the cargo of ammunition not coming down alongside?

“A. I wouldn’t know what the reasons for the delay was.

“Q. You do not know what caused the delay?

“A. What caused the delay, no, sir. [158]

“Q. And you don’t remember, or know whether the cargo was there on the dock ready to be loaded in the vessel, do you, at the times that they had the stoppage of work? A. No, I don’t.

“Q. Now, in loading cargo on Saturdays and Sundays they pay the seamen extra wages for doing that, don’t they?

“A. Of course, seamen do not do any loading.

“Q. I mean the stevedores. That is double time, isn’t it? A. I don’t know.

“Q. Well, you know the customs of the ports in regard to loading cargo up and down the coast. Now do you know the custom with respect to paying time and a half or double time for stevedore work on Saturdays and Sundays and holidays?

“A. I believe they are paid overtime, but what the conditions of paying overtime are, I don’t know.

“Q. And you do not know either what the condition of the cargo was with regard to its availability at the time, or the availability of stevedores as to their willingness to work on holidays and Sundays, or any other causes for failure to work, or not work on Saturdays, Sundays and holidays, do you?

(Deposition of Robert Craig.)

“A. No, I wouldn’t know the reason. [159]

“Q. You do not know the reasons at all?

“A. No.

“Q. Now, were there certain areas on your voyage in which the seamen got overtime for being in dangerous areas?

“A. No, not on Canadian ships.

“Q. Not on Canadian ships. But there were zones on your trip in which American ships paid bonuses? A. Yes, but not on Canadian ships.

“Q. That was by reason of the Korean hostilities at the time, wasn’t it?

“A. I understand that.

“Q. Yes. Well, those conditions out there were practically war conditions, weren’t they, in your opinion, at Kure and those places?

“A. Well, everything was under the military, which I presumed would be war conditions.

“Q. Yes, and your delivering ammunition for use against the enemy? A. Yes.

“Q. I believe on direct examination you stated that at Kure you could have discharged in seven days? A. That is my opinion.

“Q. If the conditions were such that you would have no trouble in discharging; if the conditions were right? [160]

“A. That is, under normal condition.

“Q. Under normal conditions.”

Mr. Knudsen: That was not his testimony. His testimony was that if he had been given his regular turn he could have discharged in about seven days.

(Deposition of Robert Craig.)

Mr. Staring (Reading): "Now, just a minute. He was stating now that if he had normal conditions at the pier, is that correct, you could have discharged in seven days?

"A. If the ship was alongside and discharging I certainly believe that she could be discharged within seven days.

"Q. That is correct. Now, that, however, would be subject as to whether they could carry the ammunition away and stow it, is that correct?

"A. Well, of course.

"Q. You don't know about that?

"A. I wouldn't know anything about that.

"Q. Well, if you unload cargo it has to be taken away, doesn't it?

"A. It has to be taken away, yes.

"Q. It can't be unloaded unless it can be taken away from the wharf; otherwise, it is being piled up on the wharf, isn't that correct?

"A. Yes, that is right. [161]

"Q. Then, subject to it being normally taken away as you discharged it, then you could have unloaded in seven days? A. Yes.

"Q. And that is your testimony, isn't it?

"A. Yes.

"Q. But you don't know what the conditions were with regard to stowing that cargo, do you?

"A. No.

"Q. You do know that they were out-loading a lot of cargo at Kure? A. I don't know.

(Deposition of Robert Craig.)

“Q. Did I ask you that? You don’t know that?

“A. I don’t know that.

“Q. After that cargo was discharged do you know how it was transported to where it was going?

“A. I don’t know that. I don’t know how it was transported.

“Q. Yes.

“A. I know that evidently I was bringing ammunition over there to be used in the Korean War.

“Q. And it was going over to Pusan?

“A. Yes.

“Q. Yes. Do you know who the Marine Superintendent of the Western Canada Steamship Company, Limited, was on [162] February 12th?

“A. Captain Syllinge.

“Q. Do you know his signature?

“A. I can’t recall his initials just at the moment.

“Q. All right. I will show you here what purports to be a photostatic copy of a Redelivery Certificate.”

Mr. Staring: The redelivery certificate, your Honor, has already been introduced as Libelant’s Exhibit 3. (Reading:)

“Q. Do you recognize the signature?

“A. I recognize the signature, Captain Syllinge’s signature. K. T., I believe.”

Mr. Staring: On page 98—the first question:

“Q. Were there a great number or just a few barges at Kure?

“A. I didn’t see many barges at Kure, not a great number.

(Deposition of Robert Craig.)

“Q. Do you know when the Port of Kure was opened up? A. No, I don’t know.

“Q. And you don’t know the reason it was opened up, Kure?

“A. No, I don’t know the reason.

“Q. What was the name of the man from M.S.T.S., if you know, that you met at Moji?

“A. I can’t recall his name. All I remember about [163] him was that he was a young—I believe he was a non-commissioned officer.

“Q. Was he in uniform?

“A. He was in uniform, yes.

“Q. What was he, a Chief Boatswain or something like that? A. Yes, something like that.

“Q. Was he a Chief; had a lot of hash-marks on him?

“A. No. He was square-rigged, in an officer’s uniform; he had an officer’s uniform.

“Q. A Warrant Officer?

“A. A Warrant, I believe. I will honestly say that he gave me every assistance in his power.

“Q. This young Warrant Officer of M.S.T.S.?

“A. Yes, sir.”

Mr. Staring: That is all.

(Whereupon, on redirect examination, Mr. Knudsen read the questions and Mr. Long read the answers.)

(Deposition of Robert Craig.)

Redirect Examination

“Q. Captain, did you observe any hostilities on the shore at Moji? Was there any fighting on the shore at Moji?

“A. Fighting—no, I didn’t see any fighting.

“Q. You heard no rifle fire? [164]

“A. No.

“Q. Any artillery? A. No.

“Q. Was there any bombing in the harbor at Moji? A. None at all.

“Q. How about Kure? Did you observe any rifle fire on the shore in Kure?

“A. No, there was nothing there.

“Q. Any bombing of Kure?

“A. Nothing like that.

“Q. Any air raid alerts?

“A. No, no air raid alerts.

“Q. Any air raid alerts at Moji? A. No.

“Q. Was there any cargo piled on the wharves at Kure awaiting transportation away from the dock that you saw?

“A. Not for any length of time; just cargo there in the normal course.

“Q. Normal course of transition?

“A. Normal course of transition.

“Q. Now, did you observe any out-bound cargo being loaded aboard vessels at Kure?

“A. No. We didn’t know what was happening on the wharves. The vessels were working. We

(Deposition of Robert Craig.)

could not observe whether they were loading or discharging. [165]

“Q. How about at Moji?

“A. I can’t recall at Moji, whether there was any loading going on.

“Q. Now, with respect to the barges at Kure, you finished your unloading into barges in the middle of the stream at Kure, is that right?

“A. Yes.

“Q. And were there sufficient barges so they could discharge continuously from the hatches?

“A. Yes, they kept going.

“Q. You said that you heard this ammunition was being sent to Pusan. Are you just speculating, or do you know?

“A. No, I didn’t know it was being sent to Pusan. I said I knew that the ammunition that I was carrying was destined for the Korean War, but where or how it got over there, I don’t know.

“Q. How do you know they didn’t store it in Japan for future use? A. I don’t know.

“Q. All right. That is what I wanted to get.

“Who prepared the stowage plan for the vessel at Bangor? A. The Supercargo.

“Q. An Army Supercargo?

“A. Not in uniform; a civilian. [166]

“Q. Was he a representative of the owners or of the charterers? A. Of the charterers.

“Q. Who prepared the stowage plan for the vessel at Mukilteo?

(Deposition of Robert Craig.)

“A. The same thing: A civilian Supercargo of M.S.T.S.

“Q. Did they give you copies of that stowage plan? A. If I recall, they did.

“Q. Do you know what happened to those?

“A. They should be in the ship’s files.

“Q. Did you take either of these voyages, either Voyage 1 or Voyage 2, under the charter, under convey? A. No.

“Q. Did you have any armament aboard your vessel? A. No armament.

“Q. Did you have any escort vessel at all?

“A. No escort.

“Q. Did you suffer any hostile attack on either voyage? A. No hostile attack.

“Q. On the first voyage you said you loaded primarily bombs, is that correct?

“A. That is correct.

“Q. On the second voyage you loaded 2800 tons of Air Force cargo, is that correct? [167]

“A. That is correct.

“Q. What was that generally, its category?

“Mr. Ferguson: I object to it, except ammunition, and I call the Captain’s attention to his orders.

“The Witness: All I understood is Air Force ammunition.

“Q. And what was the remainder?

“A. The remainder was general ammunition.

“Q. It was ammunition? A. Ammunition.

“Q. Now, with respect to your sailing instructions furnished by M.S.T.S., first with respect to the

(Deposition of Robert Craig.)

first voyage, did those sailing instructions give you a port of destination? A. They did.

“Q. And what was that port of destination on the first voyage? A. Okinawa.

“Q. And with respect to the second voyage, did those orders, those written orders, give you a port of destination or discharge? A. Yes.

“Q. What was that port?

“A. Yokohama. [168]

“Q. Now, Mr. Ferguson mentioned control points or reference points in the sailing instructions. What were those for?

“A. Those were for reference if I received any instructions during the voyage from the M.S.T.S. or the Naval authorities.

“Q. And when you actually received instructions to divert were those instructions couched in terms referring to one of those control points?

“A. They were couched in terms referring to one of those points, yes.

“Q. Now, is it your testimony that you don't remember whether there was any congestion in the port at Moji, or there was, in fact, no congestion, to the best of your recollection?

“A. To the best of my recollection there was no actual congestion in the Port of Moji. I did see quite a lot of ships pass through the straits, but, as regards the actual port, I didn't see any congestion.

“Q. Now, with respect to the voyage summary that you identified for Mr. Ferguson, does this pur-

(Deposition of Robert Craig.)

port to be an abstract from the log; is that what it is?

“A. This is an abstract from the log, yes.

“Q. And it is no more correct than the log?

“A. No. It is from the log; information obtained [169] from the log.

“Q. That is, the log is the source of that information? A. Yes.

“Q. That is, whatever the log shows is correct?

“A. Yes, that is right.

“Q. If there is any variance between this and the log, it is the log that is accurate?

“A. Yes.”

Mr. Staring: Let the record show the paper counsel is referring to is Respondent's Exhibit No. A-1.

Mr. Knudsen (Reading):

“Q. Do you remember whether or not you delivered the manifest to the M.S.T.S. representative at the port of discharge?

“A. All papers that I was given, on leaving the port of loading, I delivered to the M.S.T.S. representative at the port of discharge.”

Mr. Knudsen: If the Court please, we now have the manifests, and libelant would like to offer them in evidence. Libelant's 19 would be the Voyage No. 1 manifest.

The Court: Will you pause for a moment?

I asked the Clerk to allocate the names and [170] marks identifying them. Mr. Clerk, what number is that?

(Deposition of Robert Craig.)

The Clerk: Libelant's Exhibit 19, your Honor.

(Voyage No. 1 Manifest marked Libelant's Exhibit No. 19 for identification.)

The Court: What is its nature?

Mr. Knudsen: The Voyage 1 manifest.

The Court: Voyage 1 is not the subject of this litigation, is it?

Mr. Knudsen: No, your Honor, but I am using it for comparative purposes.

Libelant's No. 10 is the Voyage 2 manifest.

The Court: Mr. Clerk, have you given this exhibit a number?

The Clerk: I am now giving it a number, your Honor. It is Libelant's Exhibit 20.

(Voyage No. 2 Manifest marked Libelant's Exhibit No. 20 for identification.)

The Court: Do you wish to make your statement now as to what it is, Libelant's 20?

Mr. Knudsen: Libelant's 20, if the Court please, is the Voyage 2 manifest.

Do you have any objection—— [171]

Mr. Staring: I have no objection to their being admitted in evidence.

The Court: Do you offer both of them, Mr. Knudsen?

Mr. Knudsen: Yes, your Honor.

The Court: Each of them, 19 and 20, is and are admitted.

(Deposition of Robert Craig.)

(Libelant's Exhibits Nos. 19 and 20 received in evidence.)

The Court: Proceed with the deposition.

Mr. Knudsen (Reading):

"Well, let me ask Mr. Ferguson, on the record if you will tell me the amount of the cargo that was shipped on each voyage, I think we can stipulate that that was shipped. The amount shown by the manifests we do not know.

"Mr. Ferguson: We do not care. Whatever it says, I am willing to give you a statement of that and stipulate as to the amount. I think he has already stated that there were 9,000 some tons.

"The Witness: According to my recollection, I think I wrote a letter concerning that second voyage, and I remember those figures, 9,385. [172]

"Mr. Knudsen: Gross tons.

"Mr. Ferguson: On the first or second voyages?

"The Witness: I can't remember the figures on the first voyage. It ran about 8500 tons.

"Mr. Knudsen: I would like to know what the tonnage was on the first voyage, for the record.

"Mr. Ferguson: Well, how many pounds—you are satisfied with the pounds, are you?

"Mr. Knudsen: For the present purposes I am.

"Mr. Ferguson: O.K. 19,154,419 pounds. The cubic footage is 303,999. That is what it shows.

"The Witness: That is what it shows there, yes.

"Mr. Ferguson: Pretty close to 9,000 tons.

(Deposition of Robert Craig.)

“The Witness: That was the first, was it, the Okinawa cargo, wasn’t it?”

“Mr. Ferguson: No. That was the last one, the first half of November, 1950.

“Mr. Knudsen: That is Voyage 2. Do you have it for Voyage 1?”

“Mr. Ferguson: I do not know if I have it for Voyage 1. I will see if I can find it.

“Mr. Knudsen: All right. One further question:

“Q. Captain, do you recall the approximate tonnage that you carried on Voyage No. 1 under the charter? [173]

“A. A very rough figure would be 8500 tons.”

Mr. Knudsen: That is all.

(Whereupon, on recross-examination, Mr. Staring read the questions and Mr. Long the answers, as follows:)

Recross-Examination

Mr. Staring (Reading):

“Q. Now, when you were given a port of destination when you started out, both on Voyage 1 and Voyage 2, you were given a code name, weren’t you?”

“A. No, I was given a port of destination because I had to clear customs and declare it to customs.

“Q. Did you get it in a code, or did you get a name? A. I got the name.

“Q. You got the name? A. Yes.

“Q. But it was subject to your instructions? I

(Deposition of Robert Craig.)

mean you also got instructions that you would receive word as to your further course when you got to a certain point, didn't you?

"A. No, I can't recall getting those instructions that I would definitely receive anything.

"Q. Well, you have described it before in your former testimony, haven't you, correctly? [174]

"A. Yes; that I understood, just as in the case of any other charter, they can change their minds.

"Q. Now, we gave you the totals on the Army manifest for the Yokohama voyage, which was the second voyage. Now, will you give him the number of pounds on the first voyage?

"A. 17,298,010 pounds."

Mr. Staring: That is all.

The Court: Does the libelant offer this deposition as part of the libelant's case in chief?

Mr. Knudsen: Yes, your Honor.

The Court: The deposition as read is now received as part of the libelant's case in chief with like effect as if the witness Robert Craig were personally present and was sworn and testified from the witness stand as in the deposition reflected.

Mr. Knudsen: I will call Capt. Clarke.

The Court: Capt. Clarke, please come forward and be sworn as a witness. [175]

CAPT. JOHN ST. CLAIR CLARKE

called as a witness by and on behalf of libellant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Knudsen:

Q. Captain, will you please state your full name and address?

A. John St. Clair Clarke, 5538 Olympic Street, Vancouver, B. C.

Q. And what is your occupation?

A. I am the President and General Manager of Western Canada Steamship Company, Ltd.

Q. How long have you been with that company?

A. Since July, 1948.

Q. And during the last six months of 1950 and the first six months of 1951, what was your position with that company?

A. I was the operating manager of the company at that time.

Q. What were your duties as operating manager?

A. To see that the ships were kept moving. By that, I mean the crews were aboard and the ships were kept under proper repair so that we then reported to our traffic people [176] the movements of the ships so they could have the next cargo ready for us.

Q. And were you subsequently made general manager of the company?

A. I was made general manager in March, 1951.

(Testimony of Capt. John St. Clair Clarke.)

Q. And what generally, were your duties in that capacity?

A. The general operations of the company, over all, as general manager in charge of all departments.

Q. Will you briefly relate your experience prior to your employment with Western Canada Steamship Company in operating cargo vessels?

A. Having been at sea for twenty years, I came ashore as a marine superintendent in October, 1944, for the Park Steamship Company, which operated Canadian Government ships during that time, during the war, and I stayed with them—was promoted to their operating manager in 1946 when I stayed with them until the company more or less disintegrated. All ships were sold to private interests, and it was in July, 1948, I joined Western Canada Steamship Company.

The Court: Will you give the names of some of those Park Steamship Company ships?

The Witness: Your Honor, there were 300 of them.

The Court: Any of them you can think of?

The Witness: Atwater Park, Princeton [177] Park——

The Court: Did all have the name “Park” as part of the name?

The Witness: Yes, sir.

The Court: You may proceed.

Q. (By Mr. Knudsen): Are you a licensed master, Captain? A. I am.

Q. And is that any ocean, any tonnage?

(Testimony of Capt. John St. Clair Clarke.)

A. Any ocean, any tonnage of merchant ships.

Q. When did you receive your license, do you recall? A. 1932.

Q. And have you actually sailed as a master?

A. I was master for one year during the war until I came ashore in October, 1944.

Q. Have you sailed as first officer?

A. I was chief officer or first officer all during the war years from 1943 until I became master in—in 1944.

Q. And on what type of vessels?

A. Mostly on passenger vessels carrying troops during the war and then on the cargo ship for just over a year as master.

Q. Have you any experience in the North Pacific trade between the West Coast of the United States and Canada and Japan and Okinawa and oriental ports?

A. Prior to the war I was twelve years on [178] the oriental service of the Canadian Pacific steamships.

The Court: At this point we will take a recess of about ten minutes.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Knudsen): In what capacity did you serve aboard the vessels in your twelve years' experience in the North Pacific trade for the Canadian Pacific Steamship Company?

A. I started in as a cadet and went all the grades

(Testimony of Capt. John St. Clair Clarke.)

of officer up to and including the chief officer on those ships.

Q. Are you an experienced navigator?

A. Yes, sir.

Mr. Knudsen: Will you mark this for identification?

The Clerk: Libelant's Exhibit 21.

(Chart of the North Pacific Ocean marked Libelant's Exhibit No. 21 for identification.)

The Court: Are you indicating that this is an official chart?

Mr. Knudsen: That is right, your Honor.

The Court: You are sure it is an official chart?

Mr. Knudsen: Yes, your Honor. [179]

It was gotten out by a governmental agency, and it probably has an identifying official mark.

The Court: I want to say to counsel on both sides for their information and consideration that I want to hear the words reflecting evidence in this case rather than to see pictures of them.

Proceed.

Q. (By Mr. Knudsen): Captain, handing you what has been marked for identification as Libelant's Exhibit 21, can you identify that chart?

A. This is a general chart of the North Pacific Ocean.

Q. Is it an official publication of the Hydrographic Office of the United States Navy?

A. It is an official Hydrographic Chart No. 9790.

The Court: Of what government?

(Testimony of Capt. John St. Clair Clarke.)

The Witness: Hydrographic Office of the United States Navy, your Honor.

The Court: What number did the Clerk give this?

The Clerk: Libelant's No. 21, your Honor.

Q. (By Mr. Knudsen): On the chart, marked in black ink, is a course from Seattle to Okinawa and return. Can you tell me what that course represents? [180]

A. This is the course of the Lake Sicamous on Voyage 1 under the charter. The positions on it I have checked from the log books that I saw yesterday.

Q. And what route does that represent?

A. That route is what we refer to as the composite Great Circle route sailing from Seattle to Japan.

The Court: You mean sailing route?

The Witness: Yes, your Honor.

The Court: From Seattle to where?

The Witness: Japan.

The Court: You may inquire.

Q. (By Mr. Knudsen): On that chart marked in red ink is another route from Seattle or Bangor, Washington, to Moji, Kure and Kobe, Japan, and return to Seattle. Can you tell me what that route represents?

A. That route is the second voyage of the Lake Sicamous. and the positions again were checked from the log books that were presented.

Mr. Knudsen: If the Court please, I offer this

(Testimony of Capt. John St. Clair Clarke.)

Libelant's No. 21 in evidence as illustrative of the actual routes of the vessel as taken from the log book positions.

Mr. Staring: I have no objection to its being received in evidence. [181]

The Court: It is admitted.

(Libelant's Exhibit No. 21 received in evidence.)

The Court: You may proceed.

Q. (By Mr. Knudsen): With reference to the route shown for the second voyage, is that route the normal commercial route from Seattle to Japan?

A. It is not a normal route for commercial use at all, sir.

The Court: Would you read the answer?

(Whereupon the last answer is read by the court reporter.)

The Court: You may inquire of him now.

Q. (By Mr. Knudsen): Would you compare that route with the composite Great Circle route as far as distance is concerned?

The Court: Excuse the interruption, but I thought you asked about the Great Circle route, and the last answer refers to that one.

Will you read the last three answers in the record?

(Whereupon the last three questions and answers are read by the court reporter.) [182]

(Testimony of Capt. John St. Clair Clarke.)

Mr. Knudsen: I think I can clear this up by a question.

The Court: The word "normal" distinguishes this from some other or some other from this. Is that what you mean by the word "normal"?

Mr. Knudsen: Yes. There are customary commercial routes, and on this second voyage the vessel did not take one; on the first voyage, the vessel did. The Captain identified the route on the first voyage as being a composite Great Circle route. On the second one, he has identified it as being a route that is not a customary or normal commercial route.

Q. (By Mr. Knudsen): Will you explain generally the difference in course taken on the second voyage as between the first voyage? Was it more southerly, etc.?

A. The courses taken on the first voyage are the shortest and most expeditious courses to take both to and from Japan and from Seattle. The other route is much longer and is not used commercially because there is nothing to be gained. In fact, you lose, doing that extra distance, and from this particular route, the extra distance going on the Southern route, is approximately 1,000 miles longer.

Q. By the "Southern route," you mean the one in red? [183]

A. The one in red.

Q. And that was the route on the second voyage?

A. That is correct.

Q. And that would be an extra 1,000 miles to Yokohama?

A. An extra 1,000 miles to Yokohama.

(Testimony of Capt. John St. Clair Clarke.)

The Court: From Seattle, is that right?

The Witness: From Seattle, yes, your Honor.

Q. (By Mr. Knudsen): Captain, to have it absolutely clear for the record, what is the customary and most expeditious commercial route from Puget Sound to Japan?

A. It is the composite Great Circle route.

Q. And from Japan to Puget Sound?

A. A similar route, known as a composite Great Circle route, also.

The Court: May I see that exhibit?

(Whereupon Libelant's Exhibit No. 21 is handed to the Court.)

The Court: Do you intend that the courses marked on this map in black ink, Capt. Clarke, represent those routes taken by the vessel on Voyage 1?

The Witness: Yes, your Honor.

The Court: And that the routes shown or delineated on this exhibit in red ink are those taken [184] on the second voyage, each voyage being of the vessel *Lake Sicamous*?

The Witness: Yes, your Honor.

The Clerk: Libelant's Exhibit No. 22.

(U. S. Navy Hydrographic Chart No. 1262 marked Libelant's Exhibit No. 22 for identification.)

Q. (By Mr. Knudsen): Captain, handing you what has been marked for identification as Libelant's Exhibit 22, can you identify that chart?

(Testimony of Capt. John St. Clair Clarke.)

A. This is a United States Navy Hydrographic Chart showing——

The Court: What is the number?

The Witness: Chart No. 1262.

A. (Continued): It is a track chart of the world showing the selected tracks with distances from place to place in nautical miles.

Q. Now, does that show what are known as the customary commercial routes?

A. There is a note on the chart which says: "The tracks shown on this chart are based on the best navigable routes taking into consideration weather, currents, etc." The tracks shown are the Great circle, rhumb or composite—— [185]

The Court: What is the word——

The Witness: Rhumb—r-h-u-m-b.

The Court: What does "rhumb" mean?

The Witness: A rhumb line is a straight line where you cross all meridians of longitude at the same angle. It is a straight line, not taking into consideration the curvature of the earth.

Q. (By Mr. Knudsen): Does that chart show the composite Great Circle from Seattle to Yokohama and from Yokohama to Seattle?

A. It does.

Q. Does it show the official distance?

A. It shows a distance—Seattle to Yokohama—of 4,254 miles.

The Court: I wonder if he is reading the contents of a document not in evidence.

Mr. Knudsen: I didn't know how far to go in

(Testimony of Capt. John St. Clair Clarke.)

identification. I will offer it in evidence if the Court please.

Mr. Staring: I have no objection to its being received.

The Court: Admitted.

(Libelant's Exhibit No. 22 received in evidence.)

The Court: Now you can ask him to read anything [186] on it. 4,254 miles, is that it, nautical miles?

The Witness: Yes, your Honor, Seattle to Yokohama.

The Court: You may proceed.

Q. (By Mr. Knudsen): Does it give the distance of the composite Great Circle route returning from Yokahama to Seattle?

A. It shows that, also.

Q. What is that distance?

A. Yokahama to Seattle—4,276 miles.

Q. Does that chart show any route from Seattle to any port in Japan and which approximates the route taken by the SS Lake Sicamous on her second voyage under this charter?

A. None whatsoever.

Q. Let me preface my question by saying that the log distances for the Lake Sicamous start at Port Angeles. Do you know the distance from Seattle to Port Angeles?

A. It is 60 miles, 60 nautical miles.

Mr. Knudsen: I believe that is all with that exhibit.

(Testimony of Capt. John St. Clair Clarke.)

The Court: May I have the last two questions and answers?

(Whereupon the last two questions and answers are read by the court reporter.)

Mr. Knudsen: Will you hand the witness [187] Libelant's No. 20, please?

(Whereupon Libelant's Exhibit No. 20 is handed to the witness.)

The Court: You may proceed.

Q. (By Mr. Knudsen): Captain, handing you Libelant's Exhibit No. 20, which is the manifest for Voyage 2 under the charter, have you reviewed that manifest so that you know generally what cargo was aboard the vessel on that voyage?

A. I saw that manifest this morning and have looked through it, yes.

Q. Now, Captain, in accordance with ordinary commercial practice, using reasonable dispatch, how long would it reasonably take to load that cargo aboard the vessel at Bangor, forward the vessel to Yokahama, Japan, discharge the vessel at Yokahama, and return the vessel to Seattle?

Mr. Staring: I object, your Honor. No foundation has been laid which would allow this witness to testify from using a cargo manifest to all of that information which counsel has asked by merely perusing the cold paper.

The Court: Read the question.

(Testimony of Capt. John St. Clair Clarke.)

(Whereupon the last question is read by the court reporter.)

The Court: In view of the objection, the [188] interrogating counsel is advised that the Court will postpone the opportunity to the witness to make answer to that question unless and until you first show the proper qualifications of the witness to answer it.

In that connection, I advise counsel that it would be proper to ask him a question as to his experience that you believe enters into his qualifications to answer the question.

Mr. Knudsen: Thank you, your Honor.

Q. (By Mr. Knudsen): Capt. Clarke, would you detail your experience better as a master or officer of a vessel or as an executive of a shipping company in loading cargo vessels with cargo?

The Court: How about navigating them?

Mr. Knudsen: I will take it all at once then.

Q. (By Mr. Knudsen, continued): Loading vessels, navigating vessels across the North Pacific between Puget Sound and Japanese ports, and in discharging vessels?

A. Well, starting out as a cadet, I had four years' apprenticeship on the Canadian Pacific Steamship vessels going to the Orient where, as a boy, I learned the rudiments of seamanship and navigation. Then, having secured my second mate's certificate, I was on cargo vessels for two years as [189] a junior officer getting in sufficient time

(Testimony of Capt. John St. Clair Clarke.)

for my next grade of certificate, where we loaded and discharged general cargoes. Then I was in an oil tanker, where I obtained sufficient sea time to obtain my master's certificate, and I obtained that certificate in 1932.

I then returned to the Canadian Pacific Steamship Company as a junior officer where, under senior officers, we loaded our general cargoes to and from the Orient for a matter of from 1932 until the outbreak of war in 1939. Then we carried troops of all nationalities until early in 1943. In carrying these troops, we also carried on each voyage somewhere between 4,000 and 5,000 tons of military cargoes to the different destinations where we were going.

Then when I left the passenger vessel—when it left me—I then joined the cargo ships of the Park Steamship Company as master, where we were taking general cargoes to and from Australia, and that was for a matter of over a year, when I came into the offices of Park Steamship Company in October, 1944.

As the marine superintendent of that company, I was naturally interested in the repairs and maintenance of our vessels and the cargoes that were ordered, although not handled, by myself. All the papers would go through our offices and we had in that company a good running record of all the cargoes that were carried, with their length of [190] loading time and such like.

The Court: Did you have any experience in that

(Testimony of Capt. John St. Clair Clarke.)

connection, the navigation of vessels, loading and discharging of cargoes, and the navigation of commercial vessels between Seattle and Yokahama and Kure?

The Witness: Prior to the war, your Honor, I was an officer loading normal cargo to the Orient and was a navigating officer navigating the vessels to and from.

The Court: What oriental ports?

The Witness: Yokohama, Kobe, Nagasaki, Hong Kong and Manila.

Q. (By Mr. Knudsen): Now, since you have joined Western Canada Steamship Company, what duties have you had relative to the loading and discharging of ships and supervising their movements generally in the loading and discharging when it has not been handled by yourself in person?

A. A staff with a marine superintendent who worked for me did the actual loading of the vessels and would report. I did not personally load those vessels.

Q. You have general supervision over all the activities of the company relating to the vessels, though, is that correct? [191]

A. That is correct.

Q. What are the duties of a first officer aboard a vessel?

A. His duties are general upkeep. That is the maintenance of the vessel. He is responsible for the discipline of the crew, and he is also the man who is responsible for the loading and discharging of

(Testimony of Capt. John St. Clair Clarke.)

his ship, say where the cargo goes aboard, keeping the records, and seeing it is properly discharged.

Q. And how long have you served as a first officer of a vessel? A. A matter of four years.

Q. Specifically, are you familiar with the loading and discharging and navigation of vessels of the same type as the SS Lake Sicamous?

A. I beg your pardon?

The Court: Read it.

(Whereupon the last question is read by the Court reporter.)

A. The vessel I had command of was that type.

The Court: I think you should answer yes or no. Answer yes or no.

The Witness: Then I will say, no.

The Court: Read the question again.

(Whereupon the last question is again read by [192] the court reporter.)

The Court: Your answer still stands?

The Witness: Your Honor, I am not exactly confused. I have had command of a vessel of that type.

The Court: Well, you know the meaning of words. I can tell that from your facility in speech. The questions is: "Are you familiar, etc.?"

Mr. Knudsen: I will withdraw the question and ask another.

Q. (By Mr. Knudsen): Have you had command of a vessel of the same type as the SS Lake

(Testimony of Capt. John St. Clair Clarke.)

Sicamous? A. Yes.

Q. And as master of that vessel were you completely in charge—that is to say you had the final responsibility regarding the loading of the vessel, the discharging of the vessel and her navigation?

A. Yes.

Q. You supervised all those activities?

A. Yes.

The Court: It would be proper to ask him what he knows about the subject of your inquiry finally to be made and to which objection was previously made. [193]

Q. (By Mr. Knudsen): Are you familiar with the time that it would take to load general cargo or ammunition of 9,000 tons aboard a vessel such as the SS Lake Sicamous?

A. Yes. Those records have been through my office.

Q. Are you familiar with the normal cruising speed of such vessels? A. Yes.

Q. Are you familiar with the time that would reasonably be anticipated in navigating one of such vessels from Seattle to Yokohama and return? A. Yes, I would.

Q. How long would it reasonably take to load this cargo of approximately 9,000 tons of ammunition aboard the SS Lake Sicamous at Bangor, Washington?

Mr. Staring: I will object to that question. It is not shown the witness has any familiarity with

(Testimony of Capt. John St. Clair Clarke.)

the facilities at Bangor, Washington, or the problems of locating that particular cargo.

The Court: The objection is sustained with leave to inquire.

Q. (By Mr. Knudsen): How long would reasonably be required, Captain, to load 9,000—

The Court: May I interrupt you, Mr. Knudsen? If you wish to do so, it would be appropriate for [194] you to inquire by proper form of question as to whether he has made an examination of what occurred at Bangor in reference to the loading of this vessel and with respect to the method used there and as to the amount of time consumed and inquiries of that sort.

Q. (By Mr. Knudsen): Have you made any investigation into the conditions and circumstances of the loading of the vessel at Bangor, Captain?

A. At the end of the voyage Capt. Craig reported to our office, explaining what had taken place.

The Court: All you have to say in answer to that question is yes or no, and if counsel wishes any further details, he is competent to ask for them. Answer the question yes or no.

The Witness: The answer is no, sir.

The Court: Pardon?

The Witness: I said no, sir.

The Court: Ask him another question if you will.

Q. (By Mr. Knudsen): How much time, Captain, would it reasonably take to load approximately

(Testimony of Capt. John St. Clair Clarke.)

9,000 tons of ammunition aboard a vessel such as the SS Lake Sicamous under normal port conditions with adequate loading facilities? [195]

The Court: If you know. Are you willing to attach that?

Mr. Knudsen: Yes.

Q. (By Mr. Knudsen): What is the reasonable time of such——

Mr. Staring: That is immaterial. It does not concern any issue in this case.

The Court: The objection is overruled. The Court regards this witness as the libelant in stating the answer to a question like that.

A. The records in our office show——

The Court: No, not your records. Read the question.

(Whereupon the question was read by the court reporter as follows: “Q. How much time, Captain, would it reasonably take to load approximately 9,000 tons of ammunition aboard a vessel such as the SS Lake Sicamous under normal port conditions with adequate loading facilities?”)

The Court: Mr. Knudsen also applied to the question the condition applied by the Court.

Mr. Knudsen: That is, if you know, Captain?

A. 12 to 14 days.

Q. (By Mr. Knudsen): How much time would it reasonably take to [196] navigate a vessel such as the SS Lake Sicamous with approximately 9,000

(Testimony of Capt. John St. Clair Clarke.)

tons of cargo aboard by the composite Great Circle route from Bangor, Washington, to Yokohama?

A. 18 to 20 days.

Q. How much time would it reasonably take to discharge a vessel such as the SS Lake Sicamous of approximately 9,000 tons of ammunition at a port containing customary and adequate discharge facilities?

Mr. Staring: I object, your Honor. That is irrelevant and immaterial, too. There is evidence in this case as to the actual ports at which this cargo was discharged. Counsel's own witness has testified that he had orders during the voyage requiring him to deviate upon receiving further instructions and that the voyage was not actually to Yokohama. Now, this witness has not been qualified as to the ports of Moji and Kure, and particularly with the facilities available there at the time, or even with the facilities available at Yokohama, and that is really what we are concerned with.

The Court: The objection is overruled. Do you remember the question?

The Witness: Yes, your Honor.

The Court: Answer it.

A. Similar to loading—12 to 14 days. [197]

Q. And how much time would it reasonably take to navigate the vessel from Yokohama to Seattle in ballast via the composite Great Circle route?

A. 16 to 18 days.

Q. How much time then, Captain, would the

(Testimony of Capt. John St. Clair Clarke.)

whole procedure, loading, forwarding, discharging, and returning, take?

Mr. Staring: May it be shown that my objection runs to this whole line of questioning?

The Court: It is overruled.

A. A maximum of 66 days.

Q. (By Mr. Knudsen): Do you, as president of a shipping company, in the course of your business have to make estimates of time that would reasonably be anticipated for a vessel to load and discharge cargo and complete a specified voyage?

A. Yes.

Q. And is that a part of your duties as president of the company? A. It is.

Q. And if you were advised that one of your vessels, such as the SS Lake Sicamous, were going to take on approximately a full cargo of ammunition and proceed to Japan and discharge and return, what would you estimate the time that that process would take?

A. The time I gave you—the maximum of 66 days. [198]

The Court: How many days normally would going and coming, both of them together, would such a voyage entail, if you know?

The Witness: Thirty-eight days going on the ocean.

The Court: I mean the entire——

The Witness: Sixty-six days, your Honor.

The Court: Is the round trip?

The Witness: Yes, your Honor.

The Court: You may proceed.

(Testimony of Capt. John St. Clair Clarke.)

Q. (By Mr. Knudsen): That includes loading and discharging?

A. That includes loading and discharging.

Q. Captain, does the company require reports from its masters of any unusual delay in the course of a voyage?

A. The masters write letters to the office, and when they come back in port we have written reports from the masters as well as an interview with them.

Q. And are those reports, written reports, received by you in the ordinary course of business?

A. They are received by me.

Q. That is a regular part of the administrative routine of the company, is that correct?

A. That is correct.

The Clerk: Libelant's Exhibit No. 23. [199]

(Capt. Craig's report marked Libelant's Exhibit No. 23 for identification.)

Mr. Knudsen: That might be referred to your Honor, as Capt. Craig's report.

The Court: Now, it was the Court's intention to ask counsel yesterday to disclose to opposing counsel yesterday every exhibit that they intended to have anything to do with in this trial.

Mr. Knudsen: Well, I am sorry, your Honor. I did not understand the import of the Court's request. I thought you requested us to agree on those matters that we previously discussed, matters taken from Government records, and that sort of thing.

(Testimony of Capt. John St. Clair Clarke.)

The Court: I meant every exhibit you ever expected to use in this trial.

Mr. Knudsen: This is the last one we have, your Honor, unless possibly on rebuttal.

The Court: Well, if you are certain they will be used on rebuttal, I wish you would bring them out.

Mr. Knudsen: Your Honor, it depends on what witnesses the Government offers, and I will take those up with counsel in advance.

The Court: I think the Court's statement contains sufficient expression of condition. [200] Proceed.

Q. (By Mr. Knudsen): Captain, handing you what has been marked for identification as Libelant's Exhibit No. 23, can you identify that document?

A. That is a report from Capt. Craig to myself with reference to the M.S.T.S. charter.

Q. And was that received by you in the regular course of business?

A. That was received by me in the normal course of our business.

Mr. Knudsen: I offer Libelant's 23 in evidence.

Mr. Staring: I object, your Honor, not on the ground that it is hearsay as to what Capt. Craig knew of his own knowledge but that it is full of hearsay and conjecture, as is apparent on its face, statements showing no indication of the sources.

The Court: In respect to the termination of the voyage, when was the report made, if you know?

(Testimony of Capt. John St. Clair Clarke.)

The Witness: The report was made on December 11, 1951, to me, sir.

The Court: That is how many months after the voyage was terminated, if you know?

The Witness: Nine months.

The Court: The objection is sustained.

Mr. Knudsen: That is all I have, Captain. [201]

Cross-Examination

By Mr. Staring:

Q. Captain, in direct examination the term "commercial" or "commercial voyage" I believe was used. Now, having regard for the voyages that were made by the Lake Sicamous under this charter party carrying ammunition to military ports, are they what you would call commercial voyages, voyages in commercial service, or commercial voyages? I am trying to get at the way in which you have used the term "commercial."

A. The word "commercial" is normal operations for a company in our business. When that vessel was chartered, we were given no information from the M.S.T.S. on where the ship would go or how.

Q. Is that your answer? I don't think it is completely responsive.

The Court: Ask him another question.

Q. (By Mr. Staring): What I am trying to get at, Captain, is whether, when you use the term "commercial" you apply that term to the voyages of the Lake Sicamous, is that what you call a com-

(Testimony of Capt. John St. Clair Clarke.)

mercial voyage? A. Yes.

Q. Let me ask you are you acquainted with the [202] arrangements and facilities at the naval ammunition depot at Bangor, Washington?

A. No, I am not.

Q. Captain, during the war I believe you said you sailed up until a time in 1944, is that correct?

A. That is correct.

Q. Can you tell us from what American or Canadian ports you sailed during the war?

A. From 1943 I sailed from Canadian West Coast ports to Australia and New Zealand. Prior to that I was mainly on the Atlantic Ocean and touched American East Coast ports, across to England and the Continent, and Canadian ports, also.

Q. You were, I presume, carrying war supplies largely, were you not, during that period?

A. That is correct.

Q. You stated I believe you had at times been on troop ships? A. Yes.

Q. Can you tell us how much of that service you have described was on troop ships?

A. When the war broke out in September, 1939, our vessel was immediately taken over.

The Court: I do not think that is an answer to the question. It is a very simple question. If [203] you know it, give it.

Read the question.

(Whereupon the last question is read by the court reporter as follows: "Can you tell us

(Testimony of Capt. John St. Clair Clarke.)

how much of that service you have described was on troop ships?")

A. Four years.

Q. (By Mr. Staring): And which years were they? A. From 1939 until 1943.

Q. Then I take it from 1943 to 1944 your service was not on troop ships and was on cargo ships?

A. That is correct.

Q. Now, during that year you were sailing from the West Coast to ports of Australia and New Zealand, is that correct? A. That is correct.

Q. Would you name those ports in Australia and New Zealand?

A. Sydney and Melbourne, Australia, and Auckland, Wellington, and Littleton, New Zealand.

Q. Captain, did you ever experience delays in those ports that you have named in Australia and New Zealand in being discharged?

A. No, we did not. [204]

Q. You did not? A. No.

Q. Captain, how many ships does Western Canada Steamship Company operate at the present time?

A. At the present time we operate three vessels.

The Court: In 1950 how many did you operate or have under charter?

The Witness: In 1950, your Honor, we owned twelve vessels and we had four under charter.

The Court: Of those that you owned—or in addition?

(Testimony of Capt. John St. Clair Clarke.)

The Witness: In addition to the ones that we owned.

Q. (By Mr. Staring): And in what service or services were your vessels in 1950?

A. General trading around the world.

Q. Is that still the situation with respect to the vessels you now operate?

A. That is still the situation.

Q. Your vessels put in at oriental ports, Japan particularly? A. They do.

Q. Have you yourself ever put into ports in Japan?

A. Have put into Yokahama, Kobe and Nagasaki.

Q. Have you ever put into Moji? [205]

A. Never.

Q. Ever into Kure? A. No.

Q. Into Kobe? A. In Kobe, yes.

Q. You have no knowledge then what facilities are available in ports of Moji and Misuru?

A. No, I have not.

Q. Captain, has your company ever chartered other vessels besides the Lake Sicamous to the United States Navy or the United States Government? A. No.

Q. In connection with the operation of the Lake Sicamous for the Military Sea Transportation Service, did you yourself have any direct contact with the Military Sea Transportation Service or with United States Naval authorities? A. No.

Q. Do you know, Captain, what authority issued

(Testimony of Capt. John St. Clair Clarke.)

the sailing instructions for vessels chartered to the Military Sea Transportation Service for service to the Far East during the Korean hostilities?

A. The Military Sea Transport Service would give the masters their instructions.

Q. Do you know whether they actually formulated those instructions or whether they were just a conduit for them? [206]

A. I would not know.

Q. Do you know anything about the functions of the Naval Control of Shipping Office?

A. Yes.

Q. Do you know whether that office has anything to do with the instructions issued ships chartered to the Military Sea Transportation Service?

A. No, I do not.

Q. Do you know what factors were taken into account in making up the sailing orders for the Lake Sicamous on her second voyage?

A. No, I do not.

Q. Do you know whether weather and weather conditions in the North Pacific were taken into account?

A. They would not affect—in the month of November—that voyage.

Q. Do you know of the existence of any operational zones or areas in which ships were forbidden to enter at various times during 1950 or 1951?

A. No.

Q. Would the draft of the vessel and its load line affect the route prescribed for it?

(Testimony of Capt. John St. Clair Clarke.)

A. That would have no effect at all.

Q. Wouldn't the vessel have to observe the requirements of the International Load Line Convention with respect [207] to the zones in which she sailed?

A. Yes.

Q. Captain, wouldn't you say that as to the weather in the North Pacific and along the composite Great Circle route about which you have testified it involves a greater risk of storms in the period from November through February than it does in the period of August and September?

A. The month of November is one of the best months for crossing the North Pacific in the composite Great Circle route.

Q. How about the month of December?

A. The month of December is not as good but very good.

The Court: The Court will be at recess until two o'clock.

(At 12:00 o'clock noon, Thursday, August 4, 1955, proceedings recessed until 2:00 o'clock p.m., Thursday, August 4, 1955.)

August 4, 1955—2:00 P.M.

The Court: I wish to proceed with the case on trial.

Mr. Staring: I have no further questions. [208]

The Court: Do you have any further questions of this witness?

Mr. Knudsen: Yes.

(Testimony of Capt. John St. Clair Clarke.)

Redirect Examination

By Mr. Knudsen:

Q. Captain, with reference to this charter party that is involved in this action, I will ask you as far as Western Canada Steamship Company was concerned, was it an ordinary commercial transaction?

A. It was.

Q. Based upon your experience as operator of vessels sailing by the Great Circle composite route from Puget Sound to Japanese ports and return, and based upon your experience as a shipmaster navigating such vessels, is that both a winter and a summer route? A. It is.

Mr. Knudsen: That is all I have.

Mr. Staring: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Knudsen: If the Court please, libelant has no further witnesses, but I would like to offer into [209] evidence certain admissions made by the respondent.

The Court: May I see the file?

(Whereupon the Court file is handed to the Court.)

Mr. Knudsen): Also the answers to certain interrogatories which were propounded by libelant.

The Court: Would they appear in the files and records of the case?

Mr. Knudsen: Yes, your Honor, on February 15, 1955, the request was filed, the first request.

The Court: The Request for Admissions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, are those the ones you refer to?

Mr. Knudsen: Yes, and I am concerned at this time only with No. 3.

The Court: Appearing on the first page?

Mr. Knudsen: And the answers to these requests were served upon us on March 7, 1955, and I presume filed the same day.

The Court (Examining file): Respondent's Answer to Libelant's Request for Admission of Facts and Genuineness of Documents filed March 7, 1955.

Mr. Staring, is that the answer to 3?

Mr. Staring: Yes, your Honor. That is the answer to the request that was made on February 15.

The Court: Well, you may proceed with respect [210] to that, Mr. Knudsen.

Mr. Knudsen: Question 3 in Libelant's Request for Admission of Facts reads as follows:

"That M.S.T. 197 and all amendments, modifications and addenda thereto were prepared by respondent on its own forms and submitted to libelant for signature."

The answer by respondent is as follows:

"Respondent admits Statement No. 3."

Now, if the Court please, libelant made a supplemental request for admission of facts and of gen-

uineness of documents which was filed on February 26, 1955.

The Court: Consisting of three differently stated requests?

Mr. Knudsen: That is correct, your Honor.

The Court: What and where are the answers to that?

Mr. Knudsen: The answer was served on March 7, 1955, and I assume filed the same day.

The Court: I have found it. You may proceed.

Mr. Knudsen: I am concerned, if the Court please, with No. 1 of the supplemental request reading as follows:

“That M.S.T. 197, when negotiated in July, [211] 1950, contemplated two round voyages from a port or ports on the West Coast of the United States to the Far East.”

The answer of respondent reads as follows:

“Answering unto Statement No. 1, respondent states that M.S.T. 197, when negotiated in July, 1950, contemplated the delivery of munitions of war by the SS Lake Sicamous to the Armed Forces of the United States and Allied Nations in the theatre of war during the existing Korean War at such ports and at such times as directed by the Allied officials in charge, and that upon the expiration of the first voyage, with knowledge of both parties to the charter of conditions existing in the theatre of war, a second voyage was made with consent of all concerned. Two voyages from a port or ports on the West Coast of the United States to the Far East

under such circumstances were contemplated by the parties.”

Now, if the Court please, this is an argumentative answer, and I believe that, legally speaking, this is simply an admission of the request as stated. I am not offering all this argument that is contained in this answer in evidence. I only want the admission [212] in evidence that two voyages from a port or ports on the West Coast of the United States to the Far East were contemplated by the parties. Will counsel stipulate to that?

Mr. Staring: I believe, if you want to put them in, that both the statement and the reply should go in as they stand.

The Court: Is it not rather late to object to the sufficiency of the answer? These details should have been taken care of before.

Mr. Knudsen: Well, your Honor, the last sentence is a clear admission of the request.

The Court: I don't know what you have done. You have not done anything so far as I know yet.

Mr. Knudsen: I am offering the questions as read and the answers into evidence, if the Court please.

The Court: As read?

Mr. Knudsen: Yes.

The Court: Let the record show that. Is there anything else?

Mr. Knudsen: Now, if the Court please, on June 23, 1955, libelant filed certain interrogatories——

The Court: There are three general [213] headings or paragraphs with subheads in No. 2 and No. 3, is that right?

Mr. Knudsen: That is correct, your Honor. The answers to those interrogatories were filed yesterday by respondent.

The Court: You may proceed now.

Mr. Knudsen: I would like to offer the following answers to interrogatories into evidence:

“I.

“The following ocean-going vessels under charter to Military Sea Transportation Service were in the port of Kure, Japan, for the purpose of discharging cargo in the period between December 1, 1950, and January 15, 1951:

“SS Clarksburg Victory

“SS Simmons Victory

“SS Earlham Victory

“SS Loma Victory

“SS Olympic Pioneer

“SS Hibbing Victory

“SS Marquette Victory

“SS Berea Victory

“SS Lynn Victory

“SS Escanaba Victory

“SS Gainesville Victory [214]

“SS Hunter Victory

“II.

“Vessel Name: SS Clarksburg Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: Mississippi Shipping Co., Inc.

“Vessel Name: SS Simmons Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: A. H. Bull Steamship Co.

“Vessel Name: SS Earlham Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: States Marine Corp. of Delaware.

“Vessel Name: SS Loma Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: States Marine Corp. of Delaware.

“Vessel Name: SS Olympic Pioneer.

“Owner: Olympic Steamship Co.

“Bareboat Charterer: (None.)

“Vessel Name: SS Hibbing Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: American Foreign Steamship Co.

“Vessel Name: SS Marquette Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: Pacific-Atlantic Steamship Co.

“Vessel Name: SS Berea Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: Blidberg Rothchild Co.

“Vessel Name: SS Lynn Victory:

“Owner: Maritime Admin.

“Bareboat Charterer: Dolphin Steamship Corp.

“Vessel Name: SS Escanaba Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: North American Shipping & Trading Company.

“Vessel Name: SS Gainesville Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: American Mail Line, Ltd.

“Vessel Name: SS Hunter Victory.

“Owner: Maritime Admin.

“Bareboat Charterer: Moore-McCormack Lines.

“None of the vessels named above was under any voyage charter and all were time chartered to the United States through Military Sea Transportation Service.

“III.

“The duration of the terms of the time charters of all the vessels named above was ‘a period of about 120 days from the time of delivery of the vessel or [215] to the termination of the voyage current at termination date.’ The dates upon which the terms commenced were as follows:

“Vessel Name	Date Term Commenced
“SS Clarksburg Victory	September 6, 1950
“SS Simmons Victory	September 7, 1950
“SS Earlham Victory	October 2, 1950
“SS Loma Victory	September 7, 1950
“SS Olympic Pioneer	July 22, 1950
“SS Hibbing Victory	August 30, 1950
“SS Marquette Victory	August 13, 1950
“SS Berea Victory	September 1, 1950

“SS Lynn Victory.....August 26, 1950

“SS Escanaba Victory.....August 30, 1950

“SS Gainesville Victory.....September 6, 1950

“SS Hunter Victory.....September 8, 1950

“All the time charters of the vessels mentioned above provided that charterer had the privilege of continuing the charter for a second period of about 120 days.”

Libelant rests, if the Court please.

Pardon me, your Honor. I offer those answers to the interrogatories in evidence.

Mr. Staring: And if your Honor please, I object to the introduction of Interrogatories Nos. II [216] and III as irrelevant and immaterial and needlessly burdening the record. They concern other contracts between other parties concerning other ships and have nothing to do with the issues of this case.

Mr. Knudsen: If the Court please, one of the defenses in this case is that the delay at the port of Kure was due to congestion and that the respondent used due diligence under the circumstances obtaining. The law is that in considering the due diligence of the charterer to berth and discharge the vessel, any congestion created by the charterer's own ships in the harbor cannot be taken into account. The answers to these interrogatories show that these vessels were not only under charter to the M.S.T.S. which was causing the congestion but they were owned, with one exception, by the United

States Maritime Administration—obviously under the complete control of respondent. Not only that, but with no exception each one of these charters contained an option on the part of the Government for a 120 day extension, which was not contained in the charter of the Lake Sicamous.

Further, the answers to these interrogatories show that without exception these vessels were delivered to the M.S.T.S. later than was the SS Lake [217] Sicamous so their original 120-day period didn't run out until after that of the SS Lake Sicamous; yet it is uncontroverted in the record at this date that other vessels—most of these vessels—were unloaded before the SS Lake Sicamous, and some of them, without knowing which ones specifically, were unloaded out of turn before the SS Lake Sicamous.

We feel that this is definitely relevant to the defenses under the charter.

The Court: The objection is overruled. The Court does not intend to preclude counsel making proper arguments regarding the matter at the proper time, notwithstanding the present ruling. These interrogatories and these answers are now received in evidence as a part of the libelant's case in chief.

Mr. Knudsen: The libelant rests, your [218] Honor.

The Court: The respondent may now proceed with its case. I believe respondent's counsel has not yet been invited to make an opening statement, and respondent now has that opportunity if he wishes to use it.

Mr. Staring: If your Honor please, I will con-

tent myself with the statement which I made at the opening of the trial and would prefer to get right on with the evidence if that is satisfactory.

The Court: I had the impression that you did not make a complete statement. If I am in error about that you may disregard it, but the Court was merely giving you an opportunity to make whatever supplemental or additional statement you might wish to make at this time as to what you think the proof will be.

Mr. Staring: I appreciate that, your Honor, and thank you for the opportunity and would like to reserve the rest of my remarks for final argument.

The Court: Very well. You may.

You may call the respondent's first witness or otherwise proceed in this case.

Mr. Staring: Respondent wishes to read the depositions of Col. Harold R. Sanderson, Major Joseph Scales and Lt. Col. Raymond Blust which are on file [219] in one document.

The Court: You may proceed.

Mr. Staring: For this purpose, if your Honor please, may Mr. McCormick take the stand to read the witnesses' replies?

The Court: He may do that.

(Whereupon, the reading of the depositions was commenced with Mr. Staring reading the questions and Mr. Edward J. McCormick, Jr., Assistant U. S. Attorney, reading the answers, as follows:)

“COLONEL HAROLD R. SANDERSON

“called for examination by counsel for the respondent, being first duly sworn, was examined and testified as follows:

“Direct Examination

“By Mr. Ferguson:

“Q. Colonel, will you please state your full name?

“A. Harold R. Sanderson, Colonel, United States Army.

“Q. What is your home residence?

“A. 6057 27th Street North, Arlington 7, Virginia.

“Q. And how long have you been in the Army, Colonel? A. 12½ years.

“Q. Have you had any experience with ordnance? A. With ordnance? [220]

“Q. Yes. And ammunition?

“A. I have, sir.

“Q. Will you state what experience you have had in the handling of ammunition?

“A. Well, the instructions that I have received from responsible ammunition officers of ordnance, and my own experience and training in the handling of all types of cargo.

“Q. And what experience have you had in the handling of cargo, Colonel?

“A. I have had experience, oh, approximately eight to nine years in military instruction of han-

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dling cargo, discharging to and from ship and barge and pier of all types of cargo.

“Q. And does that include ammunition and bombs and what is known as highly explosive ammunition?

“A. Yes, sir, that included all classes of Army supply and Air Force supply, and in some instances Marine and Navy Class 5.

“Q. In the fall of 1950, say, from August of 1950 through to February of 1951, where were you stationed? A. Stationed in Kobe, Japan.

“Q. And what were your duties at that time?

“A. I was Director of Port Operations for the Kobe Port Command. This duty entailed a responsibility for the over-all operations of the port and the sub-ports which [221] were assigned to the Kobe Port Command for operation.

“Q. Were the ports of Moji and Kure within that command?

“A. Yes, sir. The port of Moji was under the command of Kobe Port Command, and myself operationally, and beginning in July of 1950 and running on to, I would say, the first part of November, 1950, Moji. Kure became a port of discharge and outloading under the Kobe Port Command in November of that year.

“Q. And how long did that continue? Did it continue up until February, 1951?

“A. Well, it continued up until this date, 1955.

“Q. Moji was maintained as a port?

“A. It was maintained, sir, as a port, but it

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came under a different administrative set-up in November. A port group came from Guam and took over the port of Moji to relieve the Kobe Command's responsibilities there due to the opening up of other ports.

"Q. And one of the other ports was Kure?

"A. Kure, Maizaru on the north coast of Japan, the opening up of a bulk and packaged petroleum depot adjacent to Kure and Hiroshima.

"Q. Can you describe what, if any, hostilities were going on in Korea from the summer of 1950 through to February, 1951? [222]

"A. Yes, sir, I have very good knowledge of that.

"Q. Will you please describe the situation?

"A. In the middle of summer, in July and August of 1950——

"Q. Pardon me. There is no secrecy involved in that?

"A. No, this is common knowledge and appeared in newspapers and magazines."

Mr. Knudsen: I think it is apparent at this point that the Colonel has no actual knowledge of the operations in Korea, and he is testifying from what appeared in newspapers and magazines and documents of that sort. He himself was stationed at the Port of Kobe, Japan, and I object to any testimony from him——

The Court: What response, if any, do you wish to make?

Mr. Staring: It appears to me that the Colonel

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from his position in that port, and from his position in the Army would be in a position to be aware of these facts.

The Court: You mean through official channels?

Mr. Staring: It will appear later they affected his job and his performance of duty.

The Court: The objection is overruled.

“A. It is not a classified history, that the U.N. forces [223] were being pushed rapidly back to the Pusan perimeter, which was an arc stretching approximately thirty miles from the Port of Pusan.

“On September 15 of that year and going back ten days before that, beginning around the first of September, they made up an amphibious fleet of joint forces of Marines and Army, that sailed out from Yokohama with complete combat loads of ordnance and Air Force ammunition to strike the invasion at Inchon just immediately south of Seoul.

“This action took place after being ordered out of the ports of Yokohama and my port of Kobe, and struck at Inchon on September 15. The results of this campaign were the increased cargo work load that went through all ports in Japan for the support of this amphibious operation, resulting in the opening up of the perimeter at Pusan and the non-stop march to the Yalu River, where several units did arrive in November of 1950.

“Towards the end of November, 1950, due to the success [224] of our campaign and the catch-up of tonnage moving into the theatre, many ships instead of coming into Japan to discharge their cargoes,

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were diverted at sea to proceed to Korea because we had opened up ports in Korea to take cargo direct instead of reshipping it out of Japan to the port of Pusan.

“Around the first week in December all hell broke loose, when the Chinese Red Army made their first appearance in numbers in what they called the second offensive, which happened, I believe, in the first week of December, 1950, which resulted in their advance and our exodus from the area north of Inchon and Seoul and on the opposite coast through the Wonchan area, the Hammung and Hamning and the Wonsan port, where we had to evacuate men and materiel, leaving only one port in Japan which we could operate, which was the Port of Pusan.

“Q. Pusan in Korea?

“A. The Port of Pusan in Korea.

“Q. Not in Japan? A. Not in Japan.

“This continued throughout December, continued for several months. Their offensive was great and they swept down through. At the Port of Inchon the tonnage-handling capacities were reduced tremendously, and Pusan bore the brunt of all cargo going into our allied forces in Korea. [225]

“This necessitated what we called the operation ‘Snap Back,’ in other words, to get such equipment out of Korea and into Japan to be used at any other time when a second offensive would be initiated by the allied forces.

“In conjunction and parallel with this operation

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many ships at sea destined for Korea were again diverted to ports in Japan and Okinawa.

“Q. Did that movement and that condition have any effect on the priorities of different types of ammunition?

“A. Yes, sir. Since the latter part of July and August and of September we had built up a tremendous amount of reserve of certain types of ammunition in Korea, and also we had built up a tremendous amount of ordnance ammunition in Japan that we had reached in many cases, which has been brought out by previous testimony in cases that are now a matter of record and have no classification, of certain cargoes which were in abundance, certain types of ordnance and ammunition were in abundance, and other cargoes were very scarce.

“Q. Can you name those different types of cargo?

“A. Yes, sir, there was napalm bombs, the explosive and fragmentation bombs. There was the new type rocket. That was a three and one-half inch rocket, and the pyrotechnics and fire bombs and long range ammunition, mortar shells of the small, medium and large sizes. [226]

“Q. Now, what you have just described is the type of ammunition that had the highest priority, is that correct? A. Yes, sir.

“Q. Will you describe the ammunition that had the low priority and of which you state that you had an overabundance?

“A. Small arms was down on the list, 30 caliber, 45 caliber 50 caliber. On artillery pieces it was

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the 105's, the 155's which were not of extreme high priority, but I would say were the middle low priority.

"Q. Colonel, showing you Libellant's Exhibit No. 20, will you look through the Air Force cargo, in the latter part of it, consisting, I think, of some 2800 tons, as testified, and state whether this cargo is of the high priority that you have described, or of the low priority.

"A. Yes, sir, this is extremely high. This is the **Air Ordnance five-inch rocket.**

"Q. Now, looking further on, that designates the Air Force cargo? A. Right, sir.

"Q. State whether the high priority cargo was in most instances or in less instances of high priority at that particular time?"

"Mr. Knudsen: I don't understand the question.

"Q. I will put a leading question then. Was Air Force [227] cargo at that particular time usually classified as high priority?

"A. I have looked at practically all of the pages here as against the type number and the type of ammunition, and I would say that this had the highest priority.

"Q. Now, looking forward in the earlier sheets, do you find some cargo which was of the low priority?

"A. Yes, sir. I see quite a bit of 105 and 155 Howitzer.

"Q. Describe other cargo as you look through it which is of the low priority.

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“A. It seems it is all 105 and 155 Howitzer ammunition. It is not high priority, that is, at that time, no, sir.

“Q. Low priority?

“A. Much lower, yes, sir.

“Q. Than that of the Air Force?

“A. Right, sir.

“Q. With respect to discharging of this cargo in Moji in the early part of November, would there be any priority in the discharge of that cargo as against the cargo from other ships?

“A. Well, I would say from my experience and my responsibilities there at that time, that regardless of what port that ship put into, the Air Force cargo would have [228] been given immediate priority.

“Q. Immediate priority and discharge?

“A. Yes, sir, over any other ship or the rest of the cargo on that ship.

“Q. Over the rest of the cargo on that ship?

“A. Yes.

“Mr. Knudsen: That is in November?

“The Witness: Yes, when the Chinese offensive started, although our stock pile of this type of ammunition—I am talking about Air Force—was very limited and regardless of any necessity, this cargo, under any normal conditions, would have received priority.

“Q. As to the other cargo, what was the arrange-

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“A. In general—I will have to speak in general terms of both ships and cargo—naturally any ship arriving at a port of discharge with a high priority cargo on it, whether it was a partial load or a full load, would have been given preference over any other ship that did not have a high priority cargo.

“Q. Now, after the discharge of the high priority cargo, would the lower priority cargo be discharged in favor of other ships having priority?

“A. No, sir. If they were in the vicinity and ready [229] to be unloaded——

“Q. What would be done with such a ship having the balance of such cargo being low priority?

“A. It would probably have to remain on the hook.

“Q. What do you mean by the ‘hook’?

“A. At our mooring and if we had restrictions on the number of ships, we could unload in the anchorage area, working hourly, that ship very possibly would have to pull outside of the harbor to a safe area and bring in another ship into the discharge area to have the cargo discharged.

“Q. State whether or not some of the ships were moved from Moji Harbor down to Kure Harbor.

“A. Yes, sir, in many instances ships would put into Moji to discharge high priority cargo, and I will go a little further and state the reason for Moji. Moji was the closest port to the Port of Pusan, approximately 100 miles farther across the Straits.

“They had a daily ship peddle service where ships would immediately load up high priority ammuni-

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tion and deliver it straight to Pusan daily. In many cases the discharge of high priority cargo at Sasebo or Moji, Sasebo being south of Moji, that high priority cargo would not go into an ammunition dump or depot.

“Q. Then you don’t recall, do you, the vessel Lake Sicamous? [230]

“A. No, sir, I don’t believe I have any recollection of any ship in general. I know the conditions and the priority and impact areas.

“Q. When a ship such as the Lake Sicamous with the balance of her cargo being low priority as you have stated, was sent down to Kure, would she then have any priority or would she have to wait her turn for discharge?

“A. There would be two factors that would have to be considered, sir. First is the priority to the cargo she carries. It is evident that the balance of her cargo was what we call ‘not needed for immediate use’ classification of priority. Second would be her length of time in the theatre. In other words, a vessel could have laid at anchor at Kobe or Osaka or Yokohama and lay there 60, 70 or 100 days without being discharged due to the priority of her cargo, and due to what we call the impact of what we call high explosives. In one area vessels had to be diverted in Japan, not for reason of discharge of priority cargo, but due to the concentration of the high explosives, because all of the explosives were loaded or unloaded out of Japan in heavily, densely

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populated areas, through the cities of Yokohama, Kure, Moji, Sasebo, Kochi and Osaka.

“It was very possible, and has happened, that a ship in Kobe or Yokohama had been there for 60 or 70 days and [231] was directed to proceed to another port, that ship did not pick up priority of discharge, in other words, first on the list, but lost that, or did not pick up a new date of arrival. Its date of arrival in the theatre, regardless of how we cleared up the high priority cargo, would carry on to its next port of discharge. For instance, a ship could come into Kobe, Moji or Sasebo, and it had been in the theatre for 25 or 30 days. She would have a priority of discharge of 25 days when she arrived at that port.

“Q. And then when she went to Kure, she would carry that?

“A. Would carry that priority, sir.

“Q. Of how many days?

“A. With the one day sailing from Moji to Kure, she would have 26 days priority of discharge, not priority of cargo, but priority of discharge.

“Q. Of her cargo?

“A. Right, sir. A ship that had been in Kobe or any other port for 40 or 50 days, with no action, would have that 40 or 50 days when it arrived at its next port. Now, if the ship with 26 days had started to work before the ship with 45 or 50 days came in the harbor, we would not normally stop the 26-day ship and take the stevedores off and go to work on the new ship coming in. But if [232] ships sailed into that port with high priority of 40 or 50 days

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and the other ship was not being worked, that ship would come first.

“Q. According to necessity?

“A. According to necessity, military necessity, yes, sir.

“Q. So, if she had only two or three days in Moji, when she got to Kure, she would have a priority of five days? A. That is right, sir.

“Q. And she would have to take her priority with respect to ships having the same type of cargo?

“A. That is right, sir.

“Q. Now, at Kure, do you recall what handling facilities you had for the discharge of cargo?

“A. Yes, sir, I do.

“Q. Will you describe them, please?

“A. The Port of Kure, due to the overflow of ammunition entering into Japan——

“Q. That is, during the latter part of November, December and January?

“A. Right, sir, before December. In November, with the great tonnages of ammunition that was moving into Japan and on into the ordnance ammunition depots, which were limited in number, the ammunition depots, that such a big backlog of cargo had accumulated in the only available [233] depots, that steps had to be taken to look further into the old Japanese depots, ones which we had not used since we occupied the country. There were three that I know of: Kure, Miseru, and one in the north of Japan, of which I do not know the name.

“A team of ordnance people and a team from my

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organization made surveys of our area of responsibility, which was Kure and Misuru, to look into the port operations, how much we could handle through the available port facilities in those two ports. I sent an officer and some other people down there to survey the Port of Kure. Now, the Port of Kure was not under the American Army. It was the headquarters of the British Commonwealth Overseas Forces, which was BCOF. It was commanded by Lieutenant General Robertson. The area of Kure was entirely under the control of the British Commonwealth Forces. It had one dock, one railroad track which circulated the dock one way, with no switches. A car came in and had to make a circle to get out. It was immediately adjacent, within a very short distance of General Robertson's headquarters and very close to the city.

"Just off the Port of Kure is an island called Eta Jima, which was the Naval Academy of the Japanese Navy. On that island there were ammunition caves, a depot for Japanese Navy ammunition. This survey, in conjunction with [234] ordnance people and my people and the British, determined what facilities could be used for the handling of ammunition discharge and the access or egress to the hinterland, to the depot.

"Q. Were there many barges available at that port for discharge?

"A. No, sir. Barges in Japan during the Korean campaign were very limited because we sent hun-

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dreds to Korea, purchased them outright from the Japanese, and barges were very tight in Japan.

“Q. In Kure were barges used mainly for the unloading of cargo?

“A. Yes, sir, they could tie one ship up to the pier and they could work from the ship to the rail car, but they were limited as to how many rail cars they could have with ammunition in them at any one time. That was further limited as to how many cars could move from the port area through the city to the depot. That is what we call mass detonation, too much in one place at one time.

“There was a stream discharge by barges, by which we discharged to barges and went to Eta Jima and discharged over there. Again we were limited by how many barges we could have in any given distance apart.

“Q. In other words, because of the explosive qualities of the cargo, they had to be limited in volume? [235] A. Right, sir.

“Q. From your experience, that is a necessary method of handling, is it?

“A. It is. It is laid down by the Coast Guard regulations and by Army ordnance and of course the Navy.

“Q. Do you know personally or remember personally whether there was considerable delay in the unloading of vessels at Kure during the month of December, 1950, and January, 1951?

“A. I am aware, sir, that throughout Japan in every port handling ammunition, they came under

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the same regulations and conditions, that vessels in my direct Port of Kobe laid at anchor for weeks. In the two ammunition ports of Yokohama some vessels would lay there as long as 90 or 100 days without a stick of cargo being taken off, the hatches being removed or the booms being rigged.

“Q. Can you state what period was common for the delay of vessels in Kure?

“A. Well, I would say that it could not be less than a month, so many came in at one time. It depended on how many were in there. If there was one ship working at the pier and another ship came in, it could not tie up at that pier because certain types of ammunition on that vessel had to go over that pier to that type of ammunition depot.

“Q. Would you say it would be common or uncommon [236] for a vessel to lie 60 or 80 days in Kure before it was discharged?

“A. Depending upon conditions, sir.

“Q. During December, 1950, and January, 1951, as you recall? A. I would say in every port.

“Q. During that period?

“A. One port in Japan in those hectic months of December, January and February.

“Q. Who was under your command in Kure? You had a command at Kure, the Port of Kure?

“A. The port command had no responsibility. I had the operational responsibility, the operation of the port itself through what we call a sub-port headquarters. Lieutenant Colonel Blust was the officer I recommended to make the original survey of the

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Port of Kure, and I believe this was shortly before Thanksgiving or around Thanksgiving, to look into the Port of Kure as an ammunition-handling port.

“Colonel Blust went down there and came back with a report. He proceeded to headquarters in Yokohama and made his report there with ordnance, of course, and the recommendation with the British forces there how much could be handled. Nothing had been done prior to Colonel Blust’s trip with the rehabilitation of the Japanese ammunition [237] depots. If the depots had been opened up and had all their equipment in operable condition, discharge naturally could have been expedited, because you could handle more, but because they had not been, the Port of Kure for quite some time could not be counted upon as a full-fledged ammunition port due to the hinterland facilities not having been rehabilitated in five years, since 1945 or prior thereto.

“Q. Was that a port for vessels with cargo similar to that shown in the manifest, Libellant’s Exhibit 20, that were sent from Yokohama and Moji for discharge?

“A. Yes, sir, vessels were sent there to have their cargo placed into the ammunition depots.

“Q. Will you state whether or not that was for the purpose of accelerating or speeding up the discharge of these other vessels?

“A. Yes, sir, it was to alleviate our impact at Kobe where we were limited to handle only one ammunition ship at one time. We could have six or eight ships sitting outside the harbor in the safe

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zone, but only one ship could be handled at one time.

“Mr. Knudsen: Was that Kobe?”

“The Witness: Yes, sir, and it was to alleviate the congestion of ships laying out there on the hooks in Yokohama. In other words, it was to open up places to [238] get rid of the cargo so we could use the ships, because ships were needed. Empty bottoms in the days of December and January were sent to Korea to roll up the First Marine Division in Hamnong and Wonson.

“Q. You don't personally have any knowledge of the arrival or discharge of the Lake Sicamous, now?”

“A. No, sir, not of any specific ship. I know I was called up many times on the phone from our out ports on a question of discharge, and in many cases I would not get copies of the manifest that would be sent to the port where the ship was. They would call up and say: ‘I have this type of ammunition, I have nothing working, it is not high priority, can I discharge it?’ Or: ‘Do I have anything coming in in the next 24 hours that has high priority cargo on it?’ And I would look at my records which would show what ships were due in the next 48 to 72 hours, and orders were passed down from higher headquarters which I would pass on to my various out ports, where a ship is coming in which is a high priority vessel and that vessel must have high priority.”

Mr. Staring: You may cross-examine.

(Deposition of Colonel Harold R. Sanderson.)

(Whereupon, on cross-examination, Mr. Knudsen read the questions and Mr. McCormick read the answers, as follows:) [239]

Mr. Knudsen: (Reading.)

“Cross-Examination

“Q. Colonel, in your testimony here today you have been speaking, I take it, rather generally as the officer in command of the area from your knowledge of the general conditions, is that correct?

“A. Not in command. I did not have command. I worked for the Command. I was director of port operations and in such capacity I was responsible to the Port Commander for efficient operation of his responsibilities.

“Q. Now, you are speaking of the Port Commander of Kobe? A. Right, sir.

“Q. Did you supervise the port operations at Kure? A. I did, sir.

“Q. Did you supervise those operations on the spot at Kure or from Kobe?

“A. Both. I would make a trip to Kure to look into the operations. I would go to any one of the ports of which I had operational responsibility. People that were selected to operate the Port of Kure were such that I had complete confidence in them which did not necessitate my running the Port of Kure personally. [240]

“Q. Approximately how often during the month of December, 1950, and the month of January, 1951,

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were you in the Port of Kure? Would you have any idea?

“A. I believe I was there once in the month of December and it was either the latter part of January or the first part of February.

“Q. During the months of December, 1950, and January, 1951, how many Japanese ports were you in? How many did you visit?

“A. I will run down the coast of Japan. Our Kobe Port Command had every port south of Yokohama, which included Port of Nagoya, Osaka, Kobe, Tokyama, Wakayama, Kure, Hiroshima, Miseru—that is the only port in Japan on the north Coast—Moji.

“Q. Just a moment, Colonel. I am speaking only of December, 1950, and January, 1951.

“A. Exclude the Port of Moji in December, 1950.

“Q. So, when you on direct examination stated that any condition was general in all ports in Japan, you only know that of your own personal knowledge with respect to those ports that you visited? I mean those are the only ports you observed?

“A. No, sir; I observed the Port of Yokohama. It was under another command entirely. I was in daily communication by telephone to the transportation—— [241]

“Q. I am not interested to whom you talked on the telephone.”

Mr. Knudsen: If the Court please, I move to strike anything in relation to telephone conversations.

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Mr. Staring: This is information officially acquired during the course of the Colonel's official duties.

The Court: Is he outlining here in this record such advices or is he saying what he was informed?

Mr. Staring: He is, I believe, stating the source of his information as to some matters as to which he has already testified. The source of that information was telephone advices from other ports.

The Court: On cross-examination now, does he purport to give a telephone conversation that was not asked for?

Mr. Knudsen: No, your Honor. He is testifying——

The Court: Well, what he said up to now is not objectionable. Does it go to something else following? He has not said what he did or what it was he got over the telephone.

Mr. Knudsen: Well, if the Court please, we will proceed, and I will make further objections.

The Court: The objection is overruled as [242] to anything that has happened up to now.

Mr. McCormick: (Reading.)

"A. I was in daily communication by telephone with the transportation section, the Japanese logistical command at Yokohama, Japan, at which time the status of the ports under my jurisdiction were reported on.

"Q. Those are the ports you just named?

"A. Right, sir.

"Q. And in addition to getting telephone reports,

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you visited those also during those two months, I take it? A. Right, sir.

“Q. When Lieutenant Colonel Blust surveyed the Port of Kure and the Japanese depots approximately around Thanksgiving, 1950, did he report back to you his findings?

“A. Yes, sir, he reported back to me and the port commander when he was en route to Yokohama.

“Q. Did he report his findings with respect to the availability of the Japanese depots?

“A. The ordnance, that is their responsibility, made a report of the depots which would have to be rehabilitated before any great amount of cargo or ammunition could move into those depots.

“Q. And that report was made some time during the month of November, 1950?

“A. I think it was in November, because they were [243] given a short time to make this survey. As to the exact dates and the period covered, I cannot say.

“Q. And at that time other depot facilities in and around Kure were taxed beyond their capacity, I take it?

“A. Kure had not been opened up for ammunition until this survey was completed.

“Q. Were those the only facilities for storage of ammunition that were to be available at Kure, then? A. At Kure, yes, sir.

“Q. Now, if a vessel came in—let us take the Lake Sicamous with the remainder of a load and that remainder consisted almost exclusively of 105

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and 155 millimeter Howitzer artillery ammunition—if that vessel came into the Port of Kure on December 12, there would be no place for its cargo to be stored when it was discharged, is that correct?

“A. No, sir, I would not say there was no place for her cargo to be stored. There was available area for that cargo to be stored.

“Q. There was available area for that cargo to be stored?

“A. There was available space, we will put it that way, for that cargo to be physically placed in a certain area.

“Q. As I gathered from your testimony before, that [244] space was not the proper type of space. Am I correct?

“A. No, sir. I don't believe it is a matter of record that I said it was the space by type. It was the port capacity that could handle so much cargo through the port, port clearance of that cargo.

“Q. Now, I don't understand what you mean by port clearance. Will you go into some more detail on that?

“A. There are two steps in cargo handling: The discharge of ships and the movement of that cargo through and into the hinterland to its final destination. An hour glass has a very narrow waist, and it is not the ship discharge or the capability of a depot to receive it, it is where you place it for its first rest on the pier, and it is the reloading or another mode of transport to its final destination.

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“Q. And it is the second stage, this move away from the pier to the depot that there were inadequate facilities in December and January we are talking about.

“A. I would say the facilities were more efficient than the over-all restrictions put on the amount of cargo that could be moved through a populated area. I will give you an example to clarify that. A ship loaded with general cargo can discharge its cargo at a very high rate and can clear it through the port onto rail or truck, because there are no restrictions placed on the cargo itself. When you [245] are handling explosives it is the amount that you can handle by passing any one given point, which may be limited to 100 tons of cargo which can be in an area one-half mile wide or a mile long that can pass a given point, and no other cargo can pass that until that cargo has gone through and passed for a mile. Those are the restrictions placed on it.

“Q. So, the problem was a slowdown to the extent the slowdown was attributable to the fact you could take the cargo away from the pier at a certain rate? A. That is correct.

“Q. And that was due to the fact there was only one railroad line running from the pier, is that correct?

“A. That is, one track on the pier. Now, the tracks that led from there to a marshaling yard where there are several lines of track, where trains were made up or moved to any depot or any area

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that the restriction is how many cars you could place on a string on that one side of the dock and load into and then move off before you could bring in another string of empties for discharge. Now, the restrictions are such it is not only how many ships or barges you could have, it is how many rail cars you could have while you are working, because the danger is not as great when you have the cargo physically lashed down in a freight car and it is moving. The danger is [246] when you have unskilled people who are taking it off the ship, putting it into a rail car and shoring it up and stocking it, because you have there the open fires and cigarettes, and so forth. That is the acute danger, while you are handling the cargo, it is not while in transit.

“Q. Colonel, if I were to advise you that this ship was discharged of approximately 7,000 tons of 105 and 155 millimeter artillery ammunition in an elapsed time of approximately six days, 22 hours and 30 minutes, would you say that that is a good average rate of discharge under the circumstances at Kure?

“A. I haven't checked the weights in the manifest. Are those figures you are giving me, the 7,000 tons, are they official as far as this document is concerned?

“Q. No. I am giving you an approximation.

“Mr. Ferguson: He is putting up to you a proposed amount of tonnage to be unloaded at a certain time.

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“A. That type of cargo, 105’s and 155’s, is easier to handle than the majority of other types of high explosives. I would say that is a good discharge rate. If that ship carried 7,000 tons of ammunition and with the restrictions placed upon the amount that you could have at any one given time, that that ship got that service in six or seven days, whatever the case may be, I think it got a [247] normal rate of discharge.”

Mr. Staring: I will waive the objection.

Mr. Knudsen: Going to the top of page 31 (reading):

“The evidence shows when she started discharging she discharged in an elapsed time of six days, 22 hours and 30 minutes.

“Mr. Ferguson: If the record shows that, I have no objection.

“Q. (By Mr. Knudsen): Colonel, let me say this also: If I were to tell you that this ship commenced her discharge at Kure, both alongside the dock and also at the same time discharged over the other side into barges, and that she discharged in that manner for approximately two days and was then moved out into the stream and completed her discharge over the side into barges out in the stream, and that took approximately an additional five days or four days and some odd hours, what would that indicate to you with respect to where that cargo was being taken from the ship, first, with respect to the discharge at berth?

“A. Well, you haven’t given me the contingen-

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cies when you make that statement, if you go along with me. You have made a statement that a ship—is this a ship or the ship? [248]

“Q. This is the ship.

“A. The ship was first berthed at a pier where cargo was moved to pier and simultaneously to barge?

“Q. Discharged to pier and barge.

“A. It was moved then to an anchorage in a stream where the balance of the cargo was discharged to barges?

“Q. That is correct.

“A. Not knowing the decisions of the operational officer who changed her berth, I would say that it had come to a point that he could receive no more on the pier and moved it to an anchorage so as to complete discharge to barges.

“Now, the reason he placed the cargo in barges is based upon where that cargo was going. I don't know whether it was going to be immediately transhipped to another ship or was going to be transferred to another shore site unloading point where a ship could not tie up, with shallow water. There are many conditions.

“Q. I was wondering whether that indicates that the shells that went aboard the barges were placed in the caves at Eta Jima.

“A. If you are talking about the discharge at Kure, it is possible that another ship was due in or was waiting berth at a pier to discharge the cargo that was going to the mainland, whereas what was left on the Lake Sicamous, [249] the ship in ques-

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tion, that cargo was destined to another area where it could be handled by barge alone.

“It would be a very poor operational thing to have a ship at a berth discharge the cargo that is going to an island, where that ship could be moved to a buoy and handled, whereas the ship was waiting at anchor that should be at a berth to discharge its cargo going directly to the mainland.

“Q. Do you know what ships were actually in the Kure harbor in December and January, 1950, and 1951? A. No ship by name.

“Q. Do you know whether the ships in there were primarily M.S.T.S. ships?

“A. To the best of my knowledge, the only vessels that carried American ammunition to the theater were vessels chartered or operated by M.S.T.S.

“Q. So, if the harbor at Kure were congested, it was congested with M.S.T.S. ships?

“A. For the record, prior to the opening up of the Port of Kure for ammunition, the Port of Kure was not a free port in Japan.

“Q. That doesn't mean anything to me, Colonel.

“Colonel, if the Port of Kure were congested with shipping in the month of December, 1950, would you say that that congestion was M.S.T.S. ships? [250]

“A. I would say that I would go further than that, not only M.S.T.S. ships, I would say all ships. It was congested by vessels carrying cargo in support of the Korean operations.

“I will further qualify that. As I mentioned be-

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fore in my testimony, it was the headquarters for the British Commonwealth occupation forces, and they were supplied by British ships from Australia, New Zealand and England, supplied direct.

“Q. And did those ships also discharge at the only pier that you have referred to previously?

“A. I believe the restrictions placed on by General Robertson was that priority naturally must be given to a berth for any ships carrying cargo for support of the British forces who were located there and were in support of the British forces in Korea.

“Q. Was there just the one pier for ships of all nations?

“A. To the best of my knowledge, I think it was one pier. Probably two ordinary sized ships could tie up to it.

“Q. You have no knowledge of how many ships came in with U. S. cargoes and how many came in from other nations during this period?

“A. Not until I refer to the record. We had no control over any other ships in that harbor except those [251] carrying POL, packaged POL, and ammunition. We had no control.”

Mr. Staring: Your Honor, Mr. McCormick has another obligation and has to leave, and Mr. Cushman is here. May he now replace Mr. McCormick?

The Court: That may be done.

(Whereupon, Mr. McCormick retired from the courtroom and Mr. Cushman took the witness stand and continued reading the answers.)

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Mr. Staring: (Reading.)

"Q. What do you mean 'packaged POL'?"

"A. Drummed POL.

"Q. What does 'POL' mean?"

"A. Petroleum, oil and lubricants, gas, diesel and greases.

"Q. Were there any air raids during December, 1950, and January, 1951, at Kure?"

"A. Not to my knowledge, sir.

"Q. Were there any blackouts?"

"A. Not to my knowledge. I have no recollection.

"Q. Were there any hostile forces on the shore at Kure?"

"A. Hostile, armed, I would say no. Sympathizers, pro, that is a different matter. [252]

"Q. With respect to priority cargoes, as I understand it, the Army had all the 105 and 155 shells it wanted in Japan, but they didn't have enough of these five-inch rockets, is that correct?"

"A. I don't say that we had enough. You never have enough, because you don't know what the contingencies or the flow of battle will be over a period of 30 to 60 days, but 105's and 155's had been manufactured for years and been put to good use, but the rocket type ammunition was a thing that has grown out of World War II. It was something that was developed and made a necessity due to its terrific effect on troop concentrations and vehicular traffic and rails far behind the enemy lines. The rockets—I forget the name of the big rocket Gen-

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eral Dean used—the Bazooka 3.5. The need was the five-inch. I don't know what they called it, the Tiny Tim, or whatever it was. It was extremely high priority. It could do things that other similar type ammunition could not do.

“Q. But they wanted the rockets more than the artillery shells?

“A. May I clarify that? The rocket is not Army; they are Air Force.

“Q. Let us put it this way: The Air Force wanted their rockets a lot worse than the Army wanted its artillery shells? [253]

“A. Right, sir.

“Q. And those matters are coordinated for the convenience of the Government. The Air Force rockets were given priority of discharge?

“A. Yes, because the Air Force using those rockets became the Army's artillery.

“Q. You have a word for that in the Service, don't you?

“A. When you say the Air Force was given priority, I may mention that that is a unified command. The Navy, Army and Air was under one man and he made the determination for all forces. It wasn't the need of the Navy, Army or Air Force on one level as such. They came under General MacArthur, who was Supreme Commander of all forces, and he made the decisions.

“Q. In other words, one command coordinated the needs of supplies for all forces?

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“A. That is right, sir, based on the recommendations from the various forces.

“Q. And whatever was needed most was given a priority discharge? A. Right, sir.

“Q. You don't mean to say, however, that artillery was a low priority cargo at that time? Don't you mean it was lower than these rockets? How would it stack up with [254] respect to general cargo such as PX supplies, and so forth?

“A. Very few PX supplies moved in during those hectic days, sir.

“Q. You had other supplies coming in?

“A. I will go back again. I will go back to this regulation which was set down by the men experienced in many years of how much high explosives you can have in one area. It doesn't say that you have to restrict your other cargo. You are only restricted to the ammunition. You could go ahead and put 5,000 tons of cargo through that port of general cargo. The only stop of providing the people and the facilities you are using for that general cargo did not interfere with the allowable discharge and handling rate of your priority cargo.

“Q. Do you know whether any lower priority cargo came into Kure during this period?

“A. I don't know unless I look at the daily work record and the manifest of the ships at the same time.

“Q. Do you know where the manifests are now?

“A. I don't know. They were retired to Kansas City or St. Louis or some place, perhaps they are

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still in the possession of the Port of Kure or the Port of Kobe. They are the regulations—there are regulations out when you are to destroy records which have no further value, and after one year. You keep them for one year and [255] turn them into the next immediate area for storage and they eventually wind up in, I believe, the storage of records at St. Louis, Missouri.

“Q. But you don’t know where these particular records are?

“A. No, sir, I do not know. There are probably 500 of these documents. Libelant’s Exhibit 20 here was made for this one ship. There are probably several stored some place. The balance have been destroyed.

“Q. Do you know of your own personal knowledge whether or not vessels coming into Kure during December, 1950, and January, 1951, were discharged in the same order in which they came into the Port of Kure?

“A. I cannot say. I would have to look at the arrival of the ships and find out when their hatches were opened and when they were worked, in either case.

“Q. You don’t know where those records are?

“A. Those are the records that are either in the Port of Kure or the senior Port of Kobe. If they are official records, now, that have a number like ‘Department of Army Form,’ which is a recognized form put out by the Army—it is very possible that local forms were made for the use of the port. It is

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very possible those would never be brought back to St. Louis because they are not a recognized form. [256]

"I cannot answer the question whether any vessels came into the Port of Kure during that period, specifically, now, any vessel that was discharged prior or during any other vessel's discharge.

"Q. You say you don't recall the S.S. Lake Sica-mous, so you don't recall whether the military authorities knew her charter period had run out?"

Mr. Staring: I object to the use of the term. We will waive the objection.

"A. I might say this, that I don't know. We made it no point of business to look into the ship's charter. We were Army. Charters are made by Navy.

"Q. So, as a general proposition the port authorities who controlled the discharge of the vessels had no information whatsoever as to whether or not charters had expired or were about to expire or what terms vessels were chartered for?

"A. There were two ways we found out or we would be informed, and that would be through the M.S.T.S. representative who would be in Yokohama, who would advise the transportation section of the Japanese Logistical Command of certain conditions or whether the master of the vessel, when he made his port of call, advised the port authorities, who were responsible for his discharge, that his charter was to run out a certain date and he wanted his ship [257] discharged, and so forth. That would be

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the only two ways we would know about charters running out.

“Q. Do you recall when it was that there was a shortage of artillery shells in Korea in the Korean War? Was it during this period?

“A. No, sir, I don't know whether—on our second offensive, when you are advancing and your troops are before your artillery—this is my concept—that when you are advancing and your troops are before your artillery to give them cover and protection and to clear their way, that is when your artillery is most important. Probably at a later date, in 1951, before the slow-down in hostilities, probably in the spring of 1951, when we started our offensive again, that artillery then could have been a priority, 105's and 155's could have been priority.

“Q. But you do recall, do you not, Colonel, that a Congressional investigation disclosed that at one time there was a very serious shortage of artillery ammunition in Korea? It was very heavily criticized.”

The Court: Pardon me.

Mr. Staring, how much more defense testimony do you have to offer for the respondent?

Mr. Staring: If Your Honor please, I will produce no witnesses beyond these depositions. These are the last except that I may wish to put [258] in some request for admissions of fact and the response made to it.

The Court: Very well. There are about 20 or 30 more pages to be read I believe. You may proceed.

(Deposition of Colonel Harold R. Sanderson.)

Mr. Knudsen: (Reading.)

“Q. But you do recall, do you not, Colonel, that a Congressional investigation disclosed that at one time there was a very serious shortage of artillery ammunition in Korea? It was very heavily criticized.

“A. I don't know the period they were talking about 155's or 105's. There were many times when one item would be in short supply because of the usage of what we call the mortality rate or the basis we used for issuance of a round of ammunition or a piece of ammunition, which could be in many cases a unit on the right flank, a regiment was deficient when called upon to take a certain area or to fall back, the ammunition to retain their objective or hold their position, the fluidity of battle and the type of enemy you are facing, that a certain amount of ammunition which is classified as so much per day per man would far exceed your normal requirements.”

The Court: He is the longest-winded witness I ever saw.

Mr. Knudsen: (Reading.) [259]

“Q. When did you commence utilizing the Japanese depot at Kure for ammunition storage?

“A. I believe it was in November or the early part of December. I don't know the exact date. It was in 1950, either in the latter part of November or in December, I mean. I cannot verify that because I don't have the actual date where the first round of ammunition went over the side of the ship.

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“Q. But you do know these depots were not rehabilitated before Kure was reopened as a port?

“A. I believe some storage had been taking place on the mainland prior to that. I say this because the nearest port for ammunition for Kure was Kobe port. Our ammunition from Kobe went to what we call Hirona, which was located 50-some miles away from Kobe. Naturally there is a limitation of what a depot can hold. So, efforts were made by ordnance to locate other depots in the immediate area of Kobe to take the overflow of cargo, and in my recollection ordnance did go down to the Kure area prior to the survey of the port facilities and Eta Jima facilities, to receive ships, and naturally they would go to the island of Eta Jima to take care of the cargo. I have some recollection that a survey was made of ordnance at Kure to handle cargo coming through the Port of Kobe, turned south instead of going north to Hirona. [260]

“Q. With respect to artillery shells being discharged at Kure, where would they go from the Port of Kure?

“A. I don't know. I couldn't say. It is my opinion that some went to the island of Eta Jima and some to the mainland.

“Q. But you don't know?

“A. No, sir, I don't know. I would have to see all the freight waybills and the final destination and the receipt of that cargo.

“Q. Do you recall that the S.S. Hunter Victory was in Kure harbor in that December or January?

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“A. No, sir, I cannot recollect the name of any one vessel.

“Q. You can't recollect the Clarksburg Victory?

“A. I can recollect ships' names because those vessels have been in and out of Kobe port, but not on any specific voyage at any one time.

“Q. Colonel, I don't want to waste any more time on this, so let me do it this way: I would like to read a list of vessels and ask you if you specifically remember any one of those vessels being in the port of Kure during December, 1950, and January, 1951:

“The S.S. Hunter Victory; the Clarksburg Victory; the Earlham Victory; the Lynn Victory; the Olympic Pioneer; the Hibbing Victory; the Marquette Victory; the Berea [261] Victory.

“Do you recall any of those?

“A. Not at any time at that specific period being in the Port of Kure.

“Q. Now, to your knowledge was the S.S. Lake Sicamous delayed at all in the harbor of Kure due to any fault of the ship's master or her crew?

“A. I don't know, sir, whether anything like that occurred. I don't know whether the master filed any notice of protest or anything that happened in the Port of Kobe. I don't know whether he made out a readiness for discharge application. I don't know any of those facts. I don't know of anything that happened in all respects. I don't know whether there was any change when the ship was ready for discharge, anything wrong with the cargo.

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“Q. You just don’t know anything about that particular vessel?

“A. No, sir, or any other vessel in Kure.

“Q. Do you recall just when Kure was opened up as a port for American supplies?”

Mr. Staring: Waive the objection.

“A. To my recollection it was some time in November when it was first opened up for shipping. Prior to that date I don’t believe that Kure was opened up as a free port. [262]

“Q. Is it not a fact that the Chinese crossed the Yalu on November 24, 1950?

“A. There again, sir, I don’t know, but I will say that I don’t know exactly any one date they crossed the Yalu. My recollection in history is that the first concrete evidence we had of Chinese being massed was just immediately in front of the First Marine Division in the reservoir area, which was quite some distance south of the Yalu.

“Q. Perhaps I was too specific. Let me put it this way: As far as the Army was concerned, is it not true that the Chinese entered the war on November 24? That is the date that was given?

“A. I believe it was some time around that period, some time around the last part of November and early December, 1950.

“Q. The evacuation of Hungnam was completed on December 16, 1950?

“A. I don’t know the exact date, but I knew it only took a few days to get out of there.

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“Mr. Knudsen: That is all I have.

“Mr. Ferguson: I have only one question.

“Was the Certificate of Readiness of delivery of these ammunition ships required in your districts?

“The Witness: They were not required, sir, but [263] I found in my experience in commercial ports where I was operating, that many of the masters did file a notice of readiness.

“Mr. Ferguson: That is all.

“Mr. Knudsen: Thank you very much, Colonel.”

The Court: The deposition of this witness Sanderson is now received in evidence. Did you offer it as part of the repondent's case in chief?

Mr. Staring: Yes, Your Honor.

The Court: It is so received with like effect as if he had here testified orally under oath from the witness stand to the same effect as that stated in the deposition.

Anything else?

Mr. Staring: Next is the deposition of Major Joseph Walter Scales, commencing on Page 46. Skipping the preliminaries and beginning in the middle of the page——

(Whereupon, the reading of the deposition of Major Scales was commenced, with Mr. Staring reading the questions and Mr. Cushman reading the answers, as follows.) [264]

“MAJOR JOSEPH WALTER SCALES

“called for examination by counsel for the respondent, being first duly sworn, was examined and testified as follows:

“Direct Examination

“Q. Now, will you please state your name, your rank and your station?

“A. Joseph Walter Scales, Major, United States Army Reserve, stationed at Fort Eustis, Virginia.

“Q. How long have you been in the Service?

“A. In the Service 12 years and five months, sir.

“Q. What, if anything, have you had to do with the ordnance and the handling of ammunition?

“A. My original experience in the Army was as an artillery officer. In 1950 I was detailed to the Transportation Corps.

“Q. And what part of 1950?

“A. December, 1950, I was detailed into the Transportation Corps.

“Q. Did you say December?

“A. Yes. I had one previous detail in the Transportation Corps, which was in 1946 and 1947.

“Q. Now, where were you stationed in December, 1950? A. In Kobe, Honshu, Japan. [265]

“Q. What were your duties?

“A. Chief of terminal operations, Kobe Port.

“Q. Did you have anything to do with the Port of Kure? A. Yes, sir.

“Q. State what you had to do with the Port of Kure.

(Deposition of Major Joseph Walter Scales.)

“A. Kure was a subport of Kobe, Japan. Kobe Port was the operational headquarters of Kure subport. As such, the operations division and the terminal operations division had staff supervision over operations at Kure subport.

“Q. Did you have anything to do with a certain ship named the Lake Sicamous that was in Port of Kure in December, 1950, and January, 1951, to your recollection?

“A. Specifically, I recall the Lake Sicamous by name only, the fact that the Lake Sicamous was there. However, any vessel that was in the Port of Kure from 1 December, 1950, until July of 1953, that was in port to be either loaded or discharged, the staff supervision of that operation was under my supervision.

“Q. I will ask you to look at Libelant's Exhibit 20, a manifest of cargo of the Lake Sicamous, and ask you to look first at the cargo designated as Air Force cargo. A. Yes, sir.

“Q. And then the other cargo designated forward as ordnance corps. A. Yes, sir.

“Q. Now, was there in existence at Kure any priority [266] regulations for the discharge of different types of ammunition?

“A. Well, insofar as a standing priority, one that would have been in existence at all times, there probably was not. However, priorities for ammunition by various types changed according to the situation that was in existence in Korea at that particular time.

(Deposition of Major Joseph Walter Scales.)

“Q. In December, 1950, and January, 1951, was there any priority for Air Force cargo over cargo for Ordnance, Army?

“A. Yes, sir, I would say the Air Force cargo at that time was definitely priority and, definitely, this cargo was rockets.

“Q. Would you say it was high or low?

“A. It would be a high priority item.

“Q. Do you know why it was designated high priority?

“A. Well, at that time, of course, the Chinese, or shortly before that time the Chinese had just entered the Korean War and this type of ammunition, which I see is rockets, was being used by the Air Force almost as fast as it could be delivered to the theatre. In many instances cargo of this type discharged from Japan was sent to Korea to be used against the enemy.

“Q. Was there a practice of discharging a portion of a cargo consisting of high priorities and leaving the [267] low priority cargo in the vessel?

“A. I have seen that not only at this particular time but throughout the entire Korean War, sir.

“Q. Looking at the Libelant's Exhibit No. 3, what was the practice with respect to the cargo listed in there, the Air Force cargo and the Army cargo, with respect to taking out a portion, that is, discharging the Air Force cargo and leaving the Army cargo aboard the ship?

“A. I would say that would be an accepted practice at that time.

(Deposition of Major Joseph Walter Scales.)

“Q. An accepted practice? A. Yes.

“Q. Do you recall any particular vessels that were in the Port of Kure during December, 1950, and January, 1951?

“A. The one I recall most vividly is the Hibbing Victory.

“Q. What brought that to your attention?

“A. The Hibbing Victory arrived in the port with her lower No. 1 hold loaded with water, and the cargo contained therein was 155 Howitzer shells, a separate loading type of ammunition. I recall that because there was a marine casualty investigation conducted at that time regarding that vessel.

“Q. Do you recall other vessels such as the Marquette [268] Victory being in there, the Berea Victory, the Lynn Victory?

“A. Those vessels, particularly the ones you just named, sir, were in all probability there or could have been there at that time.

“Q. Do you recall the vessel?

“A. Actually I couldn't say that I recall an actual vessel being there other than the Hibbing Victory, the one I just mentioned.

“Q. And you recall the Hibbing Victory by reason of the investigation? A. Yes, sir.

“Q. Do you recall whether vessels were detained in the Port of Kure awaiting discharge for periods amounting to as much as 30, 60 and 75 days?

“A. I know that within the theatre there were ammunition vessels that had been on the hook as much as 80 days, and when I first arrived in Kobe

(Deposition of Major Joseph Walter Scales.)

on the first of December I was informed that the ammunition vessel situation in the whole theatre was very critical; that due to this break through by the Chinese, the logistic picture in Korea was all retrograde; vessels that had originally been destined for the theatre with full intent to divert to Korea had to be run into ports in Japan; and that port clearance capabilities, ammunition depot capabilities to receive, the rail system to move, had been taxed to the [269] utmost. The ports were working a 22-hour day, with only time out to permit shifts, because all of these vessels were working in streams. The Port of Kure at that time had been opened up as such as an ammunition port, and the ammunition ports at Eta Jima and Hiro Jima, to relieve some of this terrific pressure on the ammunition needed.

“Q. Do you recall of having anything to do with the Master of the S.S. Lake Sicamous?”

“A. I do not.”

Mr. Staring: That is all.

(Whereupon, on cross-examination, the questions were read by Mr. Knudsen and the answers by Mr. Cushman as follows:)

“Cross-Examination

“By Mr. Knudsen:

“Q. Major, you were stationed at Kobe?”

“A. Yes, sir.

(Deposition of Major Joseph Walter Scales.)

“Q. Did you go to Kure very often during December, 1950, and January, 1951?

“A. Actually I didn't go down at any time during that period. I had only arrived on the job there and it was some time in February before I made my first trip to Kure.

“Q. Was the Hibbing Victory a United States vessel? A. Yes, sir. [270]

“Q. A M.S.T.S. ship? A. Yes, sir.

“Q. And she had ammunition for U. S. troops?

“A. Yes, sir.

“Q. At any time during December, 1950, and January, 1951, was there any air raid at Kure?

“A. I would say no, sir.

“Q. Was there any air raid alert at Kure or Kobe that you know of?

“A. Of course, we had what we were told were practice alerts continually. Of course, we would never know whether the alert we were in was an actual raid or practice. Notices would come from our headquarters, which was the Southwest Command. They would notify you if Condition Yellow or Condition White actually existed, whether they were Russian or Chinese.

“Q. You never would know?

“A. You never would know.

“Q. Were there any hostile forces ashore at Kure? A. No, sir.

“Q. Kobe? A. No, sir.

“Q. Moji? A. No, sir.

“Q. Do you know if the Japanese ammunition

(Deposition of Major Joseph Walter Scales.)

dumps at [271] Eta Jima and Kure were rehabilitated and ready for ammunition storage on December 1st? A. On December 1st?

“Q. Yes, by December 1st.

“A. By what standards do you mean? Do you mean by the standards we would normally accept within the Ordnance Corps for the movement of ammunition and the acceptance of ammunition, or by what?

“Q. Were they ready to take and did they commence storing ammunition in them?

“A. They took some ammunition. They received ammunition, yes, sir.

“Q. Were they still in the process of doing further rehabilitation?

“A. They were rehabilitating ammunition depots within Japan until 1953, sir, yes.

“Q. I want to be a little more specific particularly with respect to the facilities right there in and around Kure. Do you know whether they were still in the process of rehabilitating those Japanese depots in December, 1950?

“A. I would say yes, sir, such things as rail lines, revetments and things like that that had been demolished under the occupation policy.

“Q. As they were rehabilitated they would be ready for more storage? [272]

“A. Their total storage capacity would be greater, yes, sir. Their daily capacity would be greater, yes, sir.

(Deposition of Major Joseph Walter Scales.)

“Q. Would you class ammunition generally as one of the vital supplies in war time?

“A. Well, yes, ammunition as a whole naturally is a vital material.

“Q. From time to time one particular type of ammunition might be more needed than at another time? A. Yes.

“Q. But ammunition generally is always urgently needed?

“A. As a class, ammunition is generally needed, yes, sir.

“Q. Generally speaking, were you advised as to the status of the various M.S.T.S. ships in the harbor at Kure with respect to whether or not they had served out their full charter period or only a portion of the charter period, and if so how much?

“A. No, sir, we received a ship status report twice daily at 800 and 2400 hours daily.

“Q. What information did that report contain?

“A. It gave first the name of the vessel. It gave its ETA, which was scratched out when it had an ATA, the type cargo it had, and its ETC and its ATC and sailing time. There was a board the size of that wall (indicating) [273] showing all the vessels in the port.

“Q. ETA is what?

“A. Estimated Time Arrival. ATA is Actual Time Arrival. ETC is Estimated Time Completion. ATC is Actual Time Completion.

“Q. Do you know that the S.S. Lake Sicamous

(Deposition of Major Joseph Walter Scales.)

was almost thirty days in the harbor at Kure awaiting a berth for discharge?

“A. Only through recollection, through what has transpired here would I be able to state that.

“Q. You have no actual remembrance of it at the time? A. No, sir.

“Q. So, you are not in position to advise us whether or not any of that delay was due to any fault of the ship officers or crew?

“A. No, sir, I could not tell you that, sir.”

The Court: Do you offer this deposition?

Mr. Staring: I do, Your Honor.

The Court: The deposition of Major Scales is now received in evidence as part of the respondent's case in chief. It is so received with like effect as if he had here testified orally under oath from the witness stand to the same effect as that stated in the deposition.

What else do you wish to do? [274]

Mr. Staring: Next we have the deposition of Lieutenant Colonel Raymond L. Blust, beginning on page 56.

The Court: You may proceed.

Mr. Staring: We'll skip the preliminaries and start at the bottom of page 56.

(Whereupon, the reading of the deposition of Lt. Col. Raymond L. Blust was commenced, with Mr. Staring reading the questions and Mr. Cushman reading the answers, as follows:)

“LT. COL. RAYMOND L. BLUST

“called for examination by counsel for the respondent, being first duly sworn, was examined and testified as follows:

“Direct Examination

“By Mr. Ferguson:

“Q. Will you please state your full name, your rank and your station?

“A. Lieutenant Colonel Raymond L. Blust, Serial Number 030671, Stationed District Transportation Officer, Pennsylvania Military District, Uniontown Gap, Pennsylvania.

“Q. What is your home address, Colonel?

“A. It would be the same. [275]

“Q. The same as your station?

“A. That is right.

“Q. How long have you been in the Service, Colonel?

“A. I have been on active duty 13 years. Prior to that I had some reserve.

“Q. What has been your experience with ordnance and ammunition?

“A. My experience with ordnance and ammunition is what I have come in contact with by being in the Transportation Corps, working with ordnance, on loading and unloading of ships and rail equipment.

“Q. How long have you been in the Transportation Corps?

“A. Since its activation in 1942 or 1943. How-

(Deposition of Lt. Col. Raymond L. Blust.)

ever, all of my active duty has been in transportation. It was in Quartermaster, and when TC took over I went there.

“Q. Did you serve during World War II?

“A. Yes, sir.

“Q. In the Transportation Corps?

“A. Yes, sir.

“Q. Where?

“A. Well, principally New Orleans Port, New Orleans, Louisiana; Mobile Port, Mobile, Alabama. Then I joined the 16th Major Port which moved as a unit. We worked at Cardiff, South Wales, the beach operation near Morleux, France. [276] Then my biggest stretch overseas in World War II was at LeHavre, France, 22 months.

“Q. In 1950, Colonel, in the months of, we will say, the fall of 1950 and through December, 1950, and January, 1951, where were you stationed?

“A. In Japan.

“Q. What ports in Japan?

“A. I was at the Headquarters. Kobe, Port Command, which was the over-all command for about six or seven smaller ports.

“Q. Was the Port of Kure a part of that command? A. Yes, sir.

“Q. And what did you have to do, if anything, with the Port of Kure?

“A. Specifically, you mean?

“Q. Yes.

“A. It was under our command. I was Port

(Deposition of Lt. Col. Raymond L. Blust.)

Commander, then Deputy Port Commander, then Port Commander off and on during that period.

“Q. Well, specifically let’s take December, 1950, and January, 1951.

“A. Yes, sir, on or about Thanksgiving of that year I was ordered to go to Kure and contact some ordnance people that were there looking over storage space and to set up an operation where we could deliver some ships to the storage [277] space they had selected. The two principal storage areas they had selected was the Island of Ita Jima and a place called Hiro. One was served by rail and the other served by water.

“Q. What were the traffic conditions in Kure with respect to the discharge of vessels and delay of discharge, if any?

“A. Well, as you probably recall, it was about the time there was considerable retreating backwards in Korea out of that Yalu River area, and there were a number of ships in the Japanese waters there that had originally been designated to go to Korea, I believe, for discharge. That was the step when they closed some of these ports, and we had to move back past the 38th Parallel. Also, there was considerable congestion at the depots that had been previously established, both rail and at the ports that had been used. So, we opened up an operation at Kure. I would say we opened up an operation at Kure the first week in December and we were sent various ships that had been selected for discharge through JLC, which is the Japanese Lo-

(Deposition of Lt. Col. Raymond L. Blust.)

gistical Command. We got our orders through them and the TC people I dealt with, who in turn got it from Ordnance. They had their requisitions and knew what they wanted for the forward areas. So, we never knew what ship they wanted us to unload first until they instructed us. [278]

“Q. Did you have any priorities there with respect to discharging certain types of cargo?

“A. Yes, sir. That changed practically daily.

“Q. I show you Libelant's Exhibit No. 20 and refer you to the list of cargoes in the latter part of it which is marked 'Air Force Cargo.' Will you look at that and tell me whether at that time it was of high or low priority?

“A. This would be very high at that time.

“Q. What type?

“A. Rockets. I believe that is Air Force. That is right, at that time. The ground force ammunition was not in demand, but the Air Force ammunition was, because every one was moving back and they were trying to protect them from the air.

“Q. Why would they need that ammunition?

“A. For immediate use.

“Q. By air? A. Right.

“Q. And looking at the early part of the listed ammunition in the first part of Libelant's Exhibit No. 20, how about that cargo?

“A. These grenades?

“Q. Yes, and the Howitzers.

“A. These are 155's. There were many, many ships having nothing but 155's, and there was a lot

(Deposition of Lt. Col. Raymond L. Blust.)

in storage. [279] What I have seen here, these would have much higher priority under existing circumstances we had at that time.

“Q. That portion of the cargo that was Air Force? A. That is right.

“Q. And the other cargo had low priority?

“A. That is right.

“Q. Was there any custom of unloading the high priority cargo out of a ship and leaving the remainder for subsequent discharge?

“A. Yes, sir, there are instances I recall. I can't tell you the names of the ships, but they would go to Pusan and finish it at a later date, and Kobe and Sasebo.

“Q. So that a cargo such as that would, you say, or would not be indicated to discharge, say, 2800 tons, if that was the Air Force cargo with rockets, and leave the balance of the cargo in the ship for discharge in accordance with arrival dates with other ships?

“A. No doubt there were other ships that had another 2800 tons of rockets, so we would knock that ship off and go to other ships and take out the priority cargo.

“Mr. Knudsen: You received the orders from where?

“The Witness: Japan Logistical Command.

“Q. (By Mr. Ferguson): And for discharge where? [280]

“A. At Yokohama. We had liaison men, and they knew what they wanted in the fighting areas.

(Deposition of Lt. Col. Raymond L. Blust.)

“Q. From your experience there could you say whether vessels were delayed with low priority ammunition cargoes such as 30, 60 or 75 days during that period?

“A. As I recall, there was a number of ships—I won’t say where they were, either Yokohama or Kobe or maybe Moji—that did lay for lengths that long. I can’t tell you the names of the ships, but I know it wasn’t uncommon during that period for them to lay there for 60 or 70 days. It wasn’t for the reason they didn’t want to unload them, they may have wanted to divert them to another port, but the ports that were open couldn’t unload the traffic. The rails were jammed very much and also the receiving points at depots.

“Q. Were they also delayed at Kure first?

“A. Certain ships could have been delayed due to priorities, not because we didn’t want to unload a ship, but because we worked 24 hours around the clock.

“Q. Each ship had its priority?

“A. That is right. It wasn’t really the ship, it was the cargo which had priority.

“Q. Do you remember any of the ships in Kure during December, 1950, and January, 1951, such as the Hibbing Victory, the Marquette Victory? [281]

“A. Yes. I remember those ships by name, but I couldn’t tell you just exactly what months they were in what port.

“Q. That is calling for too much?

(Deposition of Lt. Col. Raymond L. Blust.)

“A. I may think of some more if I think real hard.

“Q. Do you remember the Lake Sicamous?

“A. I remember the name, yes, sir. I don’t remember the ship specifically, but the name is familiar.

“Q. You don’t remember having any contact with either the ship or its master?

“A. No. It is possible I was on the ship. I just don’t remember.

“Mr. Ferguson: That is all.”

(Whereupon, on cross-examination, the questions are read by Mr. Knudsen and the answers by Mr. Cushman, as follows:)

“Cross-Examination

“By Mr. Knudsen:

“Q. Colonel, you said that you were from time to time during the period we were talking about, both Deputy Commander and Commander, and I take it that was at Kobe?

“A. We had a full Colonel. He was sent to Korea. That was about the 1st of November, on or about. I was [282] the senior Lieutenant Colonel. So, according to Army Regulations, I would assume command. Then some time, I would say late January or early February, another full Colonel was sent in, and I went back to Deputy. But during December and January I think I was in command most of the time.

(Deposition of Lt. Col. Raymond L. Blust.)

“Q. That is in Kobe? A. Yes.

“Q. And being in command in Kobe, you were also in command of Kure?

“A. That is right. We had a subport commander who reported to our operations.

“Q. Who was that?

“A. Robertson or Robinson.

“Q. Captain Robinson? A. Yes.

“Q. And he was located in Kure?

“A. In Kure.

“Q. You said priorities changed daily. I take it you meant depending upon the demands?

“A. That's the only assumption you could make, demands from the field forces through headquarters.

“Q. Artillery shells might be high and next week rockets could be high, or even the next day rockets might be high?

“A. We didn't know what it would be on that low level. [283] If they told us to unload rockets, we would unload rockets.

“Q. And that was a shifting system, there was nothing flexible about it?

“A. If we had rockets to unload and we were unloading 105's on another ship, we would kick them out. We have unloaded overstowed cargo and put it back on a ship.

“Q. But you do remember quite clearly that during the period December, 1950, there were lots of 105 and 155 artillery ammunition around?

“A. Well, that is my recollection, yes, sir. We were always heavy on that. That seemed to be the

(Deposition of Lt. Col. Raymond L. Blust.)

biggest thing coming over. This is an assumption, that probably prior to reversal they had possibly high priority and were going right into Korean ports, and when they started backing up they started putting it in Japan, at least to keep it safe.

“Q. Do you recall that during December, 1950, and January, 1951, there was a number of M.S.T.S. ships in Kobe——”

Mr. Knudsen: Now, if the Court please, the reporter has misstated that. I remember specifically asking about Kure Harbor, not Kobe Harbor, and counsel has indicated just now that he has no objection to making that correction.

The Court: Then it should be made here, also, [284] on the original, on page 65.

Mr. Knudsen: I will reread it as corrected:

“Q. Do you recall that during December, 1950, and January, 1951, there was a number of M.S.T.S. ships in Kure Harbor?”

“A. As I remember, they were all M.S.T.S., and I don’t recall any commercials in there. I might be wrong, but I don’t recall it.

“Q. Do you recall whether or not the rehabilitation of Japanese ammunition depots located in and around Kure was still taking place in December, 1950?”

“A. As I recall, there was very little rehabilitation. They had been used by the Japanese Navy. It was headquarters of the Japanese Navy on this Island of Eta Jima, and I think it was merely a question of ordnance selecting the caves they

(Deposition of Lt. Col. Raymond L. Blust.)

wanted and we being able to deliver it. Some were inaccessible to the equipment we had.

“Q. Are you the officer who made the survey around Thanksgiving for the Artillery for the depots?

“A. I did not make it for the depots. I made it for the discharge and putting ashore. In other words, my job stopped when it went ashore and was put up in front of the caves.

“Q. You weren't concerned with whether there was a place to put it? [285]

“A. I wouldn't have put it unless there had been a place to put it. I say, we used roller conveyors at Eta Jima. It was strictly a water operation to shore, but at Hiro, I don't know which place this applies to, but that was a rail movement through town.

“Q. Do you recall when Eta Jima was opened up for shell storage?

“A. I don't remember just what types of ammunition went which place. Some went to Hiro, and some went to Eta Jima. They stored in those caves.

“Q. Were they set in both Hiro and Eta Jima in December, 1950?

“A. I would say not later than around the 10th, as I recall, we were unloading a lot of ammunition. It might have been the first of December, I don't know. The only date I have correct in my mind is the date before Thanksgiving, because it was just about like this (indicating the weather outside) when I was tromping around.

(Deposition of Lt. Col. Raymond L. Blust.)

“Q. How many times were you in Kure in December, 1950, and January, 1951?

“A. I couldn't say for sure, but I was there probably 90 per cent of the time. I did make trips to Yokohama and back up to Kobe.

“Q. You recall whether or not Kure was just the M.S.T.S. ships? [286]

“A. Yes, there was always ships standing by. We could only work certain types of ships for two reasons: One was the safety factor and the other facilities. Facilities weren't good. It wasn't like working in Brooklyn, sir. Any place we could put a barge in we put it in.

“Q. Do you know why the S.S. Lake Sicamous lay at anchorage 30 days in the harbor?

“Mr. Ferguson: He said before he didn't remember the Lake Sicamous.

“The Witness: I remember the name. If you tell me it was in Kobe, I said probably that's where I remembered it, but I believe from the line of conversation we assumed it was Kure.

“Q. (By Mr. Knudsen): But you didn't recall specifically?

“A. Specifically I couldn't say. I have heard of the ship somewhere.

“Q. Was there any air raid at Kure while you were in Kure? A. Not to my knowledge.

“Q. Were there any hostile forces on the shore?

“A. No, sir.

“Q. Any air raid alerts you recall?

“A. That was a British zone, and I am not

(Deposition of Lt. Col. Raymond L. Blust.)

positive they had control of Hiroshima Prefecture. We were their [287] guests in Kure.

“Q. I take it, then, Colonel, if a ship came in with a load of artillery and ammunition and at the same time a ship came in with some rockets, for the convenience of the Government the rockets were unloaded first?

“A. I wouldn't necessarily say that first. If that was our orders. If we got orders to unload rockets, we would unload rockets. If we got orders to unload artillery, we would unload artillery. There were other types of cargo just about as high priority as rockets. I don't recall, but I think there were proximity fuses, perhaps.

“Q. Do you know whether during December, 1950, and January, 1951, vessels arriving at Kure were discharged in the same order as they arrived in the port?

“A. I would say no. Some ships might have been in Korea, some in Yokohama. They could have been partially discharged.”

Mr. Knudsen: That is all.

Mr. Staring: May that deposition be received as part of the respondent's case in chief?

The Court: It is received in evidence as part of the respondent's case in chief with like effect as if that witness was here sworn and testified orally from the witness stand to the same effect as stated in the deposition. [288]

What else do you have?

Mr. Staring: If Your Honor please, respondent rests.

The Court: Any rebuttal?

Mr. Knudsen: If the Court please, libelant rests.

The Court: It will be more convenient to the Court to hear further proceedings in this case, namely, the argument of counsel, on Monday, the 22nd, at 2:00 o'clock in the afternoon.

Mr. Knudsen: If the Court please, may all the witnesses be excused?

The Court: All of the witnesses are now excused, and the Court wishes to thank them for their patience in attending the Court upon this hot day.

Is there any reason why counsel cannot be present at the time mentioned—2:00 o'clock on the 22nd?

Mr. Staring: No, Your Honor. That would be very convenient.

The Court: If you have any further briefs to file, you may file supplemental briefs. Be sure that they are all on file prior to the close of business on the Friday preceding that day.

Mr. Knudsen: Might I ask the Court what day [289] of the week August 22nd is?

The Court: It is on Monday, August 22nd, at 2:00 o'clock in the afternoon.

Those connected with this case are excused until that time.

(At 4:45 o'clock p.m., Thursday, August 4, 1955, proceedings recessed until 2:00 o'clock p.m., Monday, August 22, 1955.)

August 22, 1955—2:00 P.M.

The Court: Are counsel ready to proceed with the further trial proceedings in the case of Western Canada Steamship Co., Ltd., vs. U. S., No. 15848?

Mr. Knudsen: Libelant is ready, Your Honor.

Mr. Staring: Ready for respondent, Your Honor.

The Court: I understand the matter comes on now, after disposing of all of the evidence, for the purpose of hearing counsel's argument on the merits.

Mr. Knudsen: Yes, your Honor.

Mr. Staring: Yes, your Honor.

The Court: Do counsel still remain content [290] with the closing of all the evidence?

Mr. Staring: Yes, your Honor.

The Court: And the resting of the case of each?

Mr. Knudsen: Yes, your Honor.

The Court: Very well. I will hear the arguments.

(Whereupon closing arguments were made by Mr. Knudsen on behalf of libelant and by Mr. Staring on behalf of respondent.) [291]

* * *

Is there any suggestion which counsel may desire to make as to a time when counsel can meet with the Court to settle and enter findings of fact and conclusions of law and decree?

Mr. Staring: If your Honor please, I should like very much if that could be done when Mr. Cushman has returned. I don't know exactly how long

that will be, but I wonder if he could arrange with opposing counsel.

The Court: I have to fix it now. [293]

Mr. Staring: May it be in ten days then, your Honor, or would your Honor like to have it sooner?

The Court: No. I have no requirement as to time. I wanted counsel to discuss the **matter together** and see if they could suggest a time they believe would be convenient to them.

(Whereupon a short conference was had between counsel.)

Mr. Staring: Ten days appears to be agreeable to counsel.

The Court: Well, it is possible the Court might attend to it on Monday, September 12, at two o'clock in the afternoon, and that is the date set for it now.

(At 3:00 p.m., Monday, August 22, 1955, trial proceedings concluded.) [294]

Certificate

I, Frances I. Gilligan, do hereby certify that I am the official court reporter for the above-entitled court, and as such, was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ FRANCES I. GILLIGAN,
Official Court Reporter.

[Endorsed]: Filed February 23, 1956. [295]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and designation of counsel, I am transmitting herewith as the apostles on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco the following original papers in the file dealing with the action, to wit:

1. Libel in personam, filed Feb. 9, 1953.
8. Answer of respondent, filed Apr. 30, 1953.
16. Request for admission of Facts and Genuineness of Documents, filed Feb. 15, 1955, with attached exhibits:
 1. Transcript of Register, "Lake Sica-mous."
 2. Amendment to Contract.
17. Supplemental Request for Admission of Facts and Genuineness of Documents, filed Feb. 26, 1955.
18. Deposition of Robert Craig, filed Mar. 1, 1955.
19. Depositions of Colonel Harold R. Sanderson, Major Joseph Scales, Lt. Col. Raymond Blust, filed Mar. 4, 1955.

20. Respondent's Answer to Libelant's Request for Admission of Facts and Genuineness of Documents, filed Mar. 7, 1955.

21. Respondent's Answer to Libelant's Supplemental Request for Admission of Facts and Genuineness of Documents, filed Mar. 7, 1955.

22. Request for Admission of Facts and Genuineness of Documents, filed Mar. 10, 1955.

23. Libelant's Answer to Respondent's Request for Admission of Facts and Genuineness of Documents, filed Mar. 18, 1955.

24. Supplemental Request for Admission of Facts and Genuineness of Documents, filed Apr. 13, 1955.

25. Libelant's Answer to Respondent's Supplemental Request for Admission of Facts and Genuineness of Documents, filed Apr. 21, 1955.

26. Interrogatories to Respondent, filed Jun. 23, 1955.

34. Answers to Interrogatories Propounded by Libelant to Respondent, filed Aug. 3, 1955.

36. Amended Answer, filed Aug. 3, 1955.

40. Court Reporter's Transcript of Court's oral decision, filed 9-2-55.

41. Findings of Fact and Conclusions of Law, filed 9-19-55.

42. Final Decree, filed Sept. 19, 1955.

43. Notice of Appeal by Libelant, filed Dec. 15, 1955.

44. Libelant's Assignment of Errors, filed Dec. 15, 1955.

45. Cost Bond on Appeal, filed Dec. 15, 1955.
46. Citation on Appeal, filed Dec. 15, 1955.
47. Libelant's Statement of Points on Appeal, filed Dec. 23, 1955.
48. Libelant's Designation of Transcript on Appeal, filed 12-23-55.
49. Stipulation and Order Extending time for filing record, filed 12-23-55.
50. Stipulation and Order for Transmittal of original exhibits to Court of Appeals, filed Dec. 23, 1955.

Libelant's Exhibits numbered 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 19 and 20.

I further certify that the Court Reporter's Transcript of testimony and proceedings will be sent up under supplemental certificate when filed in my office.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the apostles on appeal in this cause, to wit: Filing Notice of Appeal, \$5.00; and that said amount has been paid to me by proctors for the appellant.

Witness My Hand and official seal at Seattle this 18th day of February, 1956.

[Seal]

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO SUPPLEMENTAL APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to and as a part of the apostles on appeal herein, the following original document:

51. Court Reporter's Transcript of Proceedings at Trial, filed Feb. 23, 1956.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 24th day of February, 1956.

[Seal]

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15004. United States Court of Appeals for the Ninth Circuit. Western Canada Steamship Co., Ltd., Appellant vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed January 25, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO SUPPLEMENTAL APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to and as a part of the apostles on appeal herein, the following original document:

51. Court Reporter's Transcript of Proceedings at Trial, filed Feb. 23, 1956.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 24th day of February, 1956.

[Seal]

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15004. United States Court of Appeals for the Ninth Circuit. Western Canada Steamship Co., Ltd., Appellant vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed January 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15004

WESTERN CANADA STEAMSHIP COMPANY
LTD., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT
OF POINTS ON APPEAL

Comes Now Western Canada Steamship Company, Ltd., appellant herein, by and through Bogle & Gates, its proctors, pursuant to Rule 17 of the rules of this Court, and files its statement of the points upon which it intends to rely in this appeal as follows:

1. The Court below erred in finding that the redelivery of the S.S. Lake Sicamous, hereinafter called the "Vessel," to appellant was not delayed by any inexcusable act or omission connected with the loading of her cargo at Bangor, Washington. (Finding of Fact VI.)

2. The Court below erred in failing to find and conclude that the redelivery of the Vessel to appellant was delayed 11 days, 17 hours and 15 minutes by reason of the failure of appellee to load and stow the

Vessel within a reasonable time and with reasonable diligence at Bangor, Washington.

3. The Court below erred in finding that the Vessel was afforded discharging facilities and commenced to discharge as soon as discharging facilities were available after her arrival at Kure, Japan, in accordance with military priorities then in effect and the urgent needs of the armed forces engaged in hostilities in Korea. (Finding of Fact IX.)

4. The Court below erred in failing to find and conclude that the redelivery of the Vessel to appellant was delayed by 29 days, 22 hours and 20 minutes at Kure, Japan, by reason of congestion of the port created by appellee's having ordered too many ships into said port and/or by reason of appellee's failure to provide adequate storage facilities ashore at said port to receive the cargo aboard said ships and/or by reason of appellee's failure to provide adequate discharging facilities and discharge the Vessel with reasonable diligence at said port.

5. The Court below erred in finding that during the period when the vessel lay in the port at Kure priority in the use of the facilities for loading and discharging ships at said port was enjoyed by British and other ships supplying British Commonwealth forces. (Finding of Fact XII.)

6. The Court below erred in failing to find that during the entire period when the vessel lay in the Port of Kure the only ocean going ships that were in said port for the purpose of discharging cargo

were ships chartered to appellee through the Military Sea Transportation Service and (with one exception) owned by appellee through the Maritime Administration, and that each of said ships was chartered to appellee for a period of about 120 days from the time of delivery or to the termination of the voyage current at termination date, and that (with one exception) each of said ships was delivered to appellee later than was the Vessel, and that appellant had the privilege of extending the charter party applicable to each of said ships for a second period of about 120 days, and that appellee did not have the privilege of extending Charter Party "MST-197" applicable to the Vessel, hereinafter called MST-197, for a second period of about 120 days or at all.

7. The Court below erred in finding that the ports of Japan were congested everywhere as a result of efforts by the United States as a member of or in behalf of a concert of nations to get ammunition into Korea to meet a great national and international military emergency. (Finding of Fact XIII.)

8. The Court below erred in failing to find that during December, 1950, and January, 1951, the ports of Japan, and particularly the port of Kure, Japan, were congested as a result of appellee having ordered too many ships into said ports instead of other ports, and as the result of appellee having created an oversupply of certain types of ammunition in Japan, and as a result of appellee having failed to

provide adequate storage facilities in Japan for the cargoes aboard the ships ordered by appellee into said ports.

9. The Court below erred in finding that throughout the autumn of 1950 and early winter of 1951 and at all material times military operations in Korea had imposed heavy burdens on the facilities of all the military ports of Japan and had taxed the capacity of those ports, including in particular the ports of Moji and Kure, to handle military cargo and particularly to handle ammunition because of the special handling required by ammunition, the regulations applicable to it, the danger to vessels, ports, population and equipment and the precautions necessary in its movement and storage. (Finding of Fact XIV.)

10. The Court below erred in finding that any delay suffered by the Vessel in completing her second voyage under MST-197 and being redelivered to her owners was the result of the operation of military priorities, the urgent needs of United States forces engaged in military operations and the governmental operations of the United States or of the over-all command of The United Nations acting for the United States and other sovereignties which were in concert and carrying on those governmental operations, whatever they were properly called, whether they were the Korean War itself or whether they were war connected police activities of a state or of an organization of member states. (Finding of Fact XVI.)

11. The Court below erred in failing to find and conclude that the delay in the redelivery of the Vessel to appellant was proximately caused by the fault and neglect of appellee in failing to load and stow the Vessel at Bangor, Washington, with reasonable diligence, and in failing to provide cargo storage and discharging facilities for and discharge the Vessel with reasonable diligence at Kure, Japan, and particularly that said redelivery was wrongfully and unreasonably delayed for 11 days, 17 hours and 15 minutes as the proximate result of the failure of appellee to load and stow the Vessel with reasonable diligence at Bangor, Washington, and that said redelivery was wrongfully and unreasonably delayed for 29 days, 22 hours and 20 minutes as the proximate result of the failure of appellee to provide cargo storage and discharging facilities for and discharge the Vessel with reasonable diligence at Kure, Japan.

12. The Court below erred in finding that appellee exercised reasonable diligence in all the circumstances in its performance of MST-197. (Finding of Fact XVII.)

13. The Court below erred in finding that appellant failed to perform the terms and conditions of Article 29 of MST-197 by failing to make any demand for negotiations for a revision of the rate of charter hire under the terms and conditions of Article 29. (Finding of Fact XVIII.)

14. The Court below erred in failing to find and

conclude that Article 29 of MST-197 is not applicable to appellant's claim asserted herein.

15. The Court below erred in failing to find and conclude that in any event appellee waived and is estopped to assert any failure of appellant to comply with Article 29 of MST-197 in that at all times appellee refused to entertain or act upon appellant's claim for damages for breach of charter party asserted herein under Article 32 of MST-197 (The Disputes Clause).

16. The Court below erred in failing to find and conclude that in any event appellee waived and is estopped to assert any failure of appellant to comply with Article 29 of MST-197, and any such failure is excused, in that appellee failed to object to the sufficiency of the notice given or demand made thereunder by appellant at a time when appellant could have cured any such insufficiency of notice or demand, or at any other time until appellee served its Amended Answer herein.

17. The Court below erred in failing to find and conclude that in any event appellee waived and is estopped to assert any failure of appellant to comply with Article 29 of MST-197 by denying any liability to appellant under MST-197.

18. The Court below erred in failing to find and conclude that in any event not later than January 19, 1951, appellant properly demanded negotiations for a revision of the rate of charter hire under the terms and conditions of Article 29 of MST-197.

19. The Court below erred in failing to find the market rate of charter hire for the Vessel under terms and conditions similar to those of MST-197 during the period of unreasonable and wrongful delay, and in failing to find the difference between that market rate of charter hire and the charter rate of hire.

20. The Court below erred in concluding that the Vessel was redelivered to appellant by appellee within the period provided in MST-197. (Conclusion of Law II.)

21. The Court below erred in concluding that any and all delays suffered by the Vessel on her second voyage under MST-197 and all of the acts and things done and omitted which were complained of by appellant in this action, wherever occurring, were things which were excused by reason of the fact that they were compelled by the warlike and lawful police and governmental activities of appellee and of the United Nations and its member nations in their concerted support and contribution to the Korean War, and that none of the acts done which were complained of by appellant were done under any other circumstances, and that for all such acts and things done and omitted appellee is not liable in this action. (Conclusion of Law III.)

22. The Court below erred in concluding that appellee has fully performed all the matters and things to be performed by it under MST-197 and has com-

mitted no breach of MST-197. (Conclusion of Law IV.)

23. The Court below erred in concluding that appellant has failed to prove the material allegations of its libel and has failed to prove any cause of action against appellee. (Conclusion of Law V.)

24. The Court below erred in concluding that appellee is entitled to a decree dismissing the libel with costs. (Conclusion of Law VI.)

25. The Court below erred in failing to find and conclude that appellee knew or should have known that the second voyage of the Vessel under MST-197 would overlap the termination date, and that appellee was therefore obliged under MST-197 to load, stow, forward, provide cargo storage and discharging facilities for and discharge the Vessel with reasonable diligence on that second voyage, and that appellant breached its obligations to appellant under MST-197 by failing to load and stow the Vessel with reasonable diligence at Bangor, Washington, and by failing to provide cargo storage and discharging facilities for and discharge the Vessel with reasonable diligence at Kure, Japan.

26. The Court below erred in failing to find and conclude that appellant is entitled to recover damages from appellee in an amount equal to the difference between the charter rate of hire and the market rate of hire for the Vessel for the period by which redelivery of the Vessel was wrongfully delayed, to wit: 41 days, 15 hours and 35 minutes at

the rate of \$666.67 per diem making a total sum of \$27,766.41, or, alternatively, for the amount of such difference for so much of said period of delay in redelivery as the Court below should have found justly due to appellant but in no event less than 11 days, 17 hours and 15 minutes at the rate of \$845.83 per diem making a total sum of \$9,912.02.

27. The Court below erred in entering its final decree on September 19, 1955, dismissing appellant's libel herein and awarding appellee its costs against appellant in the sum of \$63.00 and decreeing that appellant recover no costs against appellee.

28. The Court below erred in failing to enter a final decree herein that appellant have and recover from appellee its damages computed as aforesaid, together with interest thereon at the rate of 6% per annum from February 9, 1953, until paid, together with its taxable costs and disbursements.

Dated March 5, 1956, at Seattle, Washington.

BOGLE, BOGLE & GATES,

/s/ C. CALVERT KNUDSEN,

Proctors for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 28, 1956.

United States Court of Appeals
For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANT
WESTERN CANADA STEAMSHIP CO., LTD.

BOGLE, BOGLE & GATES

STANLEY B. LONG

C. CALVERT KNUDSEN

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

JUL 1 - 1956

PAUL P. O'BRIEN, CLERK

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United States Court of Appeals

For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD., a corporation,	<i>Appellant,</i>	} No. 15004
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANT

WESTERN CANADA STEAMSHIP CO., LTD.

I.

STATEMENT OF JURISDICTION

This is an action for damages for alleged breach of a charter party. The alleged breach consists of an unreasonable delay on the part of the charterer (appellee) in redelivering the vessel to the owner (appellant).

The court below had jurisdiction of the action under the Suits in Admiralty Act, 46 USCA §741 *et seq.* It should be noted here that the libel originally alleged jurisdiction under the Public Vessels Act, 46 USCA §781 *et seq.* (Tr. 3-5). However, subsequent to the commencement of the action on February 9, 1953, the decision in *Calmar Steamship Corp v. United States*, 345 U.S. 446 (1953), made it clear that jurisdiction in such a case lies under the Suits in Admiralty Act, not the

Public Vessels Act, and the court below so found and concluded (Tr. 60, 64).

Jurisdiction of this court is based upon 28 USCA §1291. Appellant gave notice of appeal within 90 days after entry of the final decree in the court below pursuant to 28 USCA §2107 (Tr. 68), and filed its cost bond on appeal the same day (Tr. 76).

Appellee's amended answer to the libel filed by appellant denies any alleged breach of the charter party (Tr. 43-46), and for affirmative defenses alleges: (1) that appellant failed to comply with Article 29 of the charter party regarding revision of the charter rate of hire by failing to make a written demand for such revision (Tr. 46-50); (2) that any delay in Japanese ports was caused by congestion of those ports and the needs of the United States and the United Nations for particular cargos more than other cargos (Tr. 51-52); and (3) that any delay in Japanese ports was caused by restraint of princes, rulers or people (Tr. 53-54).

Following the trial, findings of fact, conclusions of law and the final decree were entered September 19, 1955 (Tr. 58-68), resulting in the dismissal of appellant's libel with prejudice and with costs to appellee (Tr. 67-68). It is from these findings, conclusions and decree that appellant appeals (Tr. 68-69).

II.

STATEMENT OF THE CASE

On July 26, 1950, appellant, a Canadian corporation, chartered its vessel, the SS LAKE SICAMOUS (hereinafter called the "Vessel"), to appellee (acting through the Military Sea Transportation Service) for "about 120 days from the time of delivery of the Vessel or to the termination of the voyage current at termination date" (Tr. 58-59; Ex. 1, Tr. 98-99). The charter contemplated two round voyages between the Pacific Coast and the Far East (Finding of Fact IV, Tr. 59-60). An option in favor of appellee for a 120-day extension was deleted from the charter party form (Tr. 98-99). The Vessel was delivered to appellee on August 4, 1950 (Tr. 182), and was not redelivered to appellant until February 12, 1951—192 days 13 hours after delivery! (Tr. 221). During this time the market rate of charter hire for the Vessel sharply advanced from the charter rate, \$1125.00 per diem (Tr. 98), to \$2,150.00 per diem (Tr. 173, 160).

The charter party provided, among other things, that appellee was to load and discharge the cargo at its own cost and expense (Finding of Fact II, Tr. 59). In addition, it included a mutual exception for "restraint of princes, rulers or people, . . ." (Finding of Fact II, Tr. 59, 101).

The delay complained of on this appeal consists of a delay of 11 days, 17 hours and 15 minutes in loading the Vessel at Bangor, Washington, and a delay of 29 days, 22 hours and 20 minutes lying at anchor at Kure, Japan, before the Vessel was discharged. The evidence bearing

upon these delays consists entirely of depositions, exhibits and responses to interrogatories (Depositions: Craig, Tr. 174-257; Sanderson, Tr. 296-334; Scales, Tr. 335-343; Blust, Tr. 344-355. Exhibits: Vessel log books, Ex. 16, 17, 18. Responses to Interrogatories: Tr. 290-293).

The evidence in the case is largely uncontradicted and uncontraverted. After delivery of the Vessel to appellee on August 4, 1950, she was loaded with approximately 8,500 tons of ammunition at Mukilteo, Washington, and sailed to Buckner Bay, Okinawa, for discharge, returning to Seattle on October 13, 1950, for an elapsed time of approximately 70 days on the first voyage under the charter (Tr. 182-187, 256-257).

At this point 50 days remained of the 120-day period of the charter party, and the Vessel was sent to Bangor, Washington, to load ammunition for a second voyage to Japan (Tr. 187-189, 197). At Bangor she took on approximately 9,800 tons of ammunition, consisting of 7,000 tons of 105 and 155 mm. howitzer shells, and 2800 tons of Air Force rockets (Finding of Fact VI, Tr. 60). It took almost 24 days to load the cargo at Bangor for the second voyage (Tr. 195), and during loading the Vessel was worked only one or two shifts a day after the first week, with no work on Saturdays and Sundays (Tr. 190-195).

At that time the established custom in West Coast ports was to load such vessels continuously 24 hours a day seven days a week (Tr. 189-190). Captain Craig, Master of the Vessel, and the only witness that was present at Bangor, testified without contradiction that

the Vessel was not loaded within a reasonable time at Bangor, and that with the facilities at hand there she should reasonably have been loaded in 12 days (Tr. 195-196).

Appellee introduced no evidence whatsoever to explain the delay at Bangor, and asserted no affirmative defense with respect thereto.

From Bangor the Vessel sailed for Yokohama (Tr. 197), but was diverted in mid-ocean to Moji by appellee (Tr. 200). At Moji she discharged the 2800 tons of Air Force rockets (Tr. 202-204), and from there she was sent to Kure to complete discharge (Tr. 207), arriving there on December 13, 1950 (Tr. 207). At Kure she lay at anchor 29 days, 22 hours and 20 minutes before commencing discharge (Tr. 207-208), during which period other MSTs ships, the only other ships in the harbor (Tr. 352, 354, 322), arrived and were discharged constantly (Tr. 213-214). During this period the Master was advised that the delay was due to the unavailability of storage facilities ashore for the cargo and that cargo on other ships had a higher "priority" (Tr. 211). Finally the Master was advised on January 10th that the Vessel was to be discharged as quickly as possible because her charter had expired (Tr. 212), and on January 12, 1951, discharge commenced (Tr. 208). The Vessel was then discharged with dispatch (Tr. 209-210), and returned to Seattle for redelivery to appellant on February 12, 1951 (Tr. 216-218).

The background of events was as follows: On June 24, 1950, the United States entered the Korean war via United Nations action. Early reverses forced United

Nations troops back on the Pusan perimeter in Korea. Commencing with and prior to the Inchon landing in September, United Nations troops rapidly advanced up the Korean Peninsula to the Yalu River, opening up Korean ports along the advance. Consequently, some supply vessels were sent directly to Korean ports. With the entry of the Chinese into the war in late November, United Nations forces retreated down the peninsula, closing the reopened ports. Supply vessels destined for those ports were diverted to Japanese and other ports (Tr. 299-301). In the meanwhile the United States Army had built up a tremendous reserve of artillery ammunition in Japan and had exhausted available storage facilities (Tr. 301, 307, 347-348, 351-352). Since further supplies continued to be sent over, a program of rehabilitating old Japanese ammunition depots for storage space was commenced. Certain of these facilities were located in or near Kure (Tr. 307-308, 346). The original Army survey of the Kure facilities was made around Thanksgiving (Tr. 310-311, 316, 346). By December 1st, the Kure depots were capable of receiving some ammunition (Tr. 340-341, 353). However, their rehabilitation was not complete but was still in progress (Tr. 340-341). As the rehabilitation progressed, further storage capacity was made available (Tr. 341). Because of the necessity for such rehabilitation of storage areas, the Army knew that Kure "could not be counted on as a full-fledged ammunition port" (Tr. 311).

The port of Kure was technically under British Command (Tr. 308) but by agreement the United States Army was permitted the use of the port subject only to

preference in discharge for British ships (Tr. 323). However, between December 1, 1950, and January 15, 1951, the only ships in the port were MSTS ships ordered there for discharge (Tr. 352, 354). During this period 12 MSTS ships (other than the Vessel) were in the port for discharge (Tr. 290). With one exception (the SS OLYMPIC PIONEER) they were owned by the United States (Maritime Administration) and bareboat chartered to private companies (Tr. 290-292). Without exception they were time chartered to the MSTS for about 120 days or until termination of the voyage current at termination date, with an option in favor of the MSTS for a 120-day extension (Tr. 292-293); and with one exception (the SS OLYMPIC PIONEER) the original 120-day period started later than the charter period of the Vessel and thus also expired later (Tr. 292-293).

At Kure the Army determined the order of discharge for arriving vessels by applying two criteria. The first, and most important, was the need for the cargo aboard, which was determined according to a "priority" list revised as often as needs changed, practically daily (Tr. 305, 336, 347, 349, 351). At the time here involved the 2800 tons of Air Force cargo was "high priority" cargo (Tr. 302, 337, 347), and the 105 and 155 mm. artillery shells were "low priority" because of the abundant reserves of such ammunition already on hand in Japan (Tr. 324, 347-348, 351). The second criteria for order of discharge, which applied only in the absence of "priority" of cargo, was the length of time of the ship in the theatre (Tr. 305), regardless of her length of time at the ultimate port of discharge (Tr. 306).

In the meanwhile on January 19, 1951, appellee, through its agent in New York, notified the contracting officer under the charter party that in view of the delay appellee intended "to claim an increase in the per diem hire figure of \$1125.00 for the period in excess of 120 days due to the higher Time Charter rates paid subsequent to the expiration of the 120-day charter period, the increase to be agreed upon at a later date" (Ex. 5, 6; Tr. 119, 134). When appellant presented its claim for damages for the delay to appellee, the contracting officer rejected it for lack of authority over a claim for unliquidated damages for breach of contract (Ex. 8; Tr. 122-123). Thereafter the General Accounting Office, conceding an unreasonable delay of at least 23 days, nevertheless rejected appellant's claim, contending that the delay was caused by unanticipated "conditions and exigencies of the war" and that Article 29 of the charter party had not been complied with (Ex. 12; Tr. 130-132).

Thereafter appellant commenced this suit.

III.

SPECIFICATION OF ERRORS

Appellant specifies as error each of the errors specified in appellant's Statement of Points on Appeal (Tr. 364-372).

These specifications may be conveniently grouped under the following questions:

A. Whether the delay at Bangor was the result of the failure of appellee to load the Vessel with reasonable diligence or within a reasonable time under the circumstances.

The court below found that the redelivery of the Vessel to appellant "was not delayed by any inexcusable act or omission connected with the loading of her cargo at Bangor" (Finding of Fact VI, Tr. 60-61); and that appellee "exercised reasonable diligence in all the circumstances in its performance" of the charter party (Finding of Fact XVII, Tr. 64).

Appellant contends that these findings are clearly erroneous in that (1) there is no evidence in the record to support them, and (2) the only evidence in the record on this point requires a finding that the redelivery of the Vessel to appellant was unreasonably delayed by 11 days, 17 hours and 15 minutes by the failure of appellee to load the Vessel with reasonable diligence or within a reasonable time under the circumstances at Bangor.

B. Whether the delay at Kure was the result of the failure of appellee to provide a berth and discharging facilities for and discharge the Vessel with reasonable diligence or within a reasonable time under the circumstances.

The court below found that the Vessel was discharged at Kure "as soon as discharging facilities were available, in accordance with military priorities then in effect and the urgent needs of the armed forces engaged in hostilities in Korea" (Finding of Fact IX, Tr. 61); and that appellee "exercised reasonable diligence in all the circumstances in its performance" of the charter party (Finding of Fact XVII; Tr. 64).

Appellant contends that these findings are clearly erroneous in that the overwhelming evidence in the rec-

ord requires a finding that the redelivery of the Vessel to appellant was unreasonably delayed by 29 days, 22 hours and 20 minutes by the failure of appellee to provide discharging facilities for and discharge the Vessel with reasonable diligence or within a reasonable time under the circumstances at Kure.

C. Whether the delays at Bangor and Kure are excused under the "restraint of princes" clause in the charter party.

The trial court found and concluded in effect that the delays at Bangor and Kure were caused by sovereign acts of the United States and the United Nations in the conduct of the Korean war and were therefore excused under the "restraint of princes" exception in the charter party (Findings of Fact XIII, XIV, XV, XVI, Tr. 62-64; Conclusion of Law III, Tr. 65).

Appellant contends that these findings and conclusions are clearly erroneous in that (1) there is no evidence in the record to support them with reference to the delay at Bangor; and (2) the overwhelming evidence in the record regarding the delay at Kure requires a finding (a) that the delay at Kure was caused by the lack of storage facilities ashore and the congestion of the port created by appellee itself, and (b) that the Korean war was neither the sole nor the direct proximate cause of the delay; and (c) that the "priority of cargo" discharge system was not a sovereign measure but was merely the basis upon which appellee as a charterer or consignee determined the order in which it would discharge its supplies from waiting vessels.

D. Whether Article 29 of the charter party (Revi-

sion of Rate of Hire) is applicable to appellant's claim for damages for delay, and, if so, whether compliance therewith was waived, and, in any event, whether appellant substantially complied therewith in fact.

The court below found that appellant "failed to perform the terms and conditions of Article 29 of the charter party by failing to make any demand for negotiations for a revision of the rate of charter hire under the terms and conditions of Article 29" (Finding of Fact XVIII, Tr. 64).

Appellant contends that this finding is clearly erroneous in that (1) Article 29 is not applicable to a claim for damages for delay (*i.e.*, breach of contract), (2) if Article 29 is applicable, any lack of compliance therewith was waived by appellee, and (3) in any event the only evidence in the record on this point is that appellant made a sufficient demand under Article 29 on January 19, 1951.

D. What amount of damages should be decreed in favor of appellant?

Since all of the evidence necessary to compute appellant's damages is before this court, the decree below should be reversed and a decree awarding damages to appellant, with interest and costs, entered by this court.

In addition such of the other conclusions of the court below as are inconsistent with appellant's contentions stated above, together with the final decree, are erroneous for the reasons stated above (Conclusions of Law II, IV, V, VI, Tr. 65-66; Final Decree, Tr. 67-68).

IV.

SUMMARY OF ARGUMENT

- A. This Court May Set Aside a Finding of the Court Below That Is Clearly Erroneous.**
- B. The Delay at Bangor Was Caused by the Failure of Appellee to Load the Vessel Within a Reasonable Time or With Reasonable Diligence Under the Circumstances.**

Appellee knew or should have known that the second voyage under the charter party would be an "overlap" voyage, since the first voyage consumed more than half the 120-day charter term. Appellee was thus under a duty to load, forward, provide discharging facilities for and discharge the Vessel with reasonable diligence on the second voyage. This is an essential part of the doctrine permitting the charterer a reasonable overlap under a charter for "about" a specified term. Appellant concedes that the second voyage was a reasonable overlap voyage when designated, and seeks only to recover its damages for the wrongful delay that occurred in the course of the voyage. Under such circumstances the charter party became essentially a voyage charter with respect to the overlap voyage.

Where, as here, the charterer agrees to load the ship, and no time for loading is specified in the charter party, the charterer is bound to load the ship within a reasonable time and with reasonable diligence under the circumstances. At Bangor appellee took 23 days, 17 hours and 15 minutes to load the Vessel. Of that time the Vessel was actually worked by the stevedores only 9 days, 19 hours and 30 minutes; therefore she could have been

loaded in that time had the loading proceeded continuously as was the custom in West Coast ports. The uncontradicted testimony of the Vessel's Master, and the *only* testimony on this point, is that the Vessel was not loaded within a reasonable time and that she should reasonably have been loaded in 12 days with the facilities at hand.

The proof that the Vessel was not loaded in accordance with the custom in West Coast ports placed the burden on appellee to prove circumstances that would excuse the delay and its reasonable diligence under those circumstances. This appellee wholly failed to do.

C. The Delay at Kure Was Caused by the Failure of Appellee to Provide Discharging Facilities for and Discharge the Vessel Within a Reasonable Time or With Reasonable Diligence Under the Circumstances.

No time for discharge being specified in the charter party, appellee was bound to provide a berth and discharging facilities for and discharge the Vessel within a reasonable time under the circumstances at Kure. However, in determining what a reasonable time is, congestion caused by appellee having ordered too many ships into the port may not be taken into account. Nor was appellee entitled to use the Vessel for storage to supplement its onshore storage capacity.

The congestion at Kure was created entirely by ships operated by or for appellee under time charter to the MSTs. Therefore the congestion may not be taken into account in determining whether appellee provided discharging facilities for and discharged the Vessel within a reasonable time. Excluding the congestion from con-

sideration, the delay of almost 30 days at anchor before the Vessel was discharged at Kure is *ipso facto* unreasonable.

In addition, the delay was compounded by the lack of sufficient ammunition storage facilities ashore at Kure. Kure had barely been opened as an ammunition port when the Vessel arrived there, and nearby Japanese ammunition depots were just starting to be rehabilitated for use in early December. The Army, which acted as consignee or agent for the MSTS with respect to discharging ships at Kure, knew that Kure could not be counted on as a full-fledged ammunition port, and nevertheless appellee ordered more ships there for discharge than the discharge facilities could handle or storage facilities accommodate.

D. Neither the Delay at Bangor Nor the Delay at Kure Was Excused Under the "Restraint of Princes" Exception in the Charter Party.

Since appellee asserted the defense of "restraint of princes" under the charter party, appellee had the burden of proving that defense. Furthermore, appellee had to prove that the alleged restraint was the *sole proximate cause* of the delay.

Appellee did not plead "restraint of princes" as a defense to the delay at Bangor, nor did it offer any evidence in support of such a defense. There is no evidence whatsoever in the record tending to show what the reason for the delay at Bangor was, or that it was caused by a sovereign act of any nature whatsoever.

With respect to the delay at Kure, whatever its rea-

son for ordering too many ships into Kure for discharge, the fact remains that appellee acted voluntarily in that regard. Were there no congestion, there would have been no need for a "priority" system to determine order of discharge. It is clear then, that whatever the character of the "priority of cargo" system actually adopted, *i.e.*, whether or not it was the expression of sovereign will, it was not the proximate cause, and certainly not the *sole* proximate cause, of the delay.

However, in fact the "priority of cargo" discharge system was neither a "restraint" nor a restraint "of princes." It was merely a flexible, changing list of various types of ammunition, ranked in order of the logistic needs from time to time of the various United States forces, based upon which the Army selected ships for discharge according to the cargo aboard, and applied only to ships under charter to appellee.

In any event, appellee could have avoided the delay by the exercise of reasonable diligence. Had the MSTS made a proper request for immediate discharge of the Vessel upon her arrival, her charter term having expired, the Army undoubtedly would have granted the same, as such requests were not uncommon.

E. This Action Is Not Barred by Article 29 of the Charter Party Regarding Revision of the Rate of Hire.

Article 29 should be construed to be limited to a charter hire adjustment during the rightful charter period, and not a claim for damages for breach of contract by unreasonable delay.

In addition, appellant in fact actually made a sufficient demand for negotiations under Article 29. On Jan-

uary 19, 1951, appellant's agent in New York, acting pursuant to instructions from appellant, advised the contracting officer by letter that appellant intended "to claim an increase in the per diem hire figure of \$1,125.00 for the period in excess of 120 days due to the higher Time Charter rates paid subsequent to the expiration of the 120-day charter period, the increase to be agreed upon at a later date."

In any event, Article 29 is merely a limited form of arbitration clause, the benefits of which were waived by appellee's complete denial of liability under the contract.

F. Appellant's Damages Should Be Fixed at \$27,766.35 and a Decree Entered Accordingly.

In an admiralty appeal this court may dispose of the case by entering its own decree awarding damages. The measure of damages is the difference between the market and charter rates of hire for the period by which the overlap was extended by the wrongful delay.

Here the Vessel should have been redelivered on January 2, 1951, a total of 41 days, 15 hours and 35 minutes prior to actual redelivery. By early January the market rate had advanced to \$1,791.67 per diem—\$666.67 per diem more than the charter rate. Therefore appellant's total damages amount to \$27,766.35.

In addition, under the Suits in Admiralty Act appellant is entitled to interest on that amount from the time this suit was commenced, at the rate of 4% per annum, together with its costs in the court below hereinafter to be taxed.

V.

ARGUMENT

A. This Court May Set Aside a Finding of the Court Below That Is Clearly Erroneous.

In an admiralty case the Court of Appeals may set aside a finding of the District Court that is clearly erroneous. *McAllister v. United States*, 348 U.S. 19 (1954). A finding is clearly erroneous (1) when, although there is evidence in the record to support it, the Court of Appeals *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed, *McAllister v. United States, supra*; and of course, (2) when there is no evidence in the record to support it; and (3) when it is erroneous as a matter of law.

Since substantially all of the evidence bearing upon the points involved in this appeal is in the form of depositions, exhibits and answers to interrogatories, this court is in as good a position as was the court below to weigh the probative value of all the evidence, and there is no reason for this court to be loath to follow its own definite and firm convictions in the interests of substantial justice. *Cf., The Ernest H. Meyer*, 84 F.(2d) 496, 501 (C.A. 9 1936). If upon balance of the probabilities an inference made by the court below from the facts proved does not seem reasonable, this Court may find a decree based upon such evidence clearly erroneous. *Cf., McAllister v. United States*, 348 U.S. 19, 22 (1954).

B. Knowing There Was Bound to Be an Overlap, Appellee Was Bound Under the Charter Party to Use Reasonable Diligence to Load, Forward, Provide Discharging Facilities For and Discharge the Vessel on the Second Voyage.

The charter contemplated two round voyages from port or ports on the Pacific Coast to port or ports in the Orient (Finding of Fact IV, Tr. 59-60). The first voyage was from Mukilteo, Washington, to Buckner Bay, Okinawa, and return, with a cargo of ammunition, and consumed a total of 70 days, 10 hours and 36 minutes from the time of delivery (Tr. 182-187). Over one-half of the original 120-day charter period had elapsed. Appellee then determined to load the vessel with a full cargo of ammunition at Bangor, Washington, send her to Yokohama, Japan, for discharge, and return her to Seattle, Washington. As Captain Clarke, an experienced steamship operator, testified, the reasonable time to be anticipated for such a voyage was not less than 66 days (Tr. 277). Thus, it was apparent, or should have been apparent, to appellee that the second voyage under the charter party would be an overlap voyage. Under such circumstances the charter became essentially a voyage charter with respect to the second voyage, and appellee was under a duty to load, forward and discharge the vessel with reasonable diligence. *Cf., Hector SS Co. v. V. O. Sovfracht, Moscow*, (1945) 1 K.B. 343. Appellant concedes that the second voyage was a reasonable overlap voyage under the circumstances when

originally designated, and seeks only to recover for the *wrongful delay* that ensued in the course of the voyage. It is clear that a delay in redelivery due to the exercise by the charterer of a right to overlap under an "about" charter is permissible only to the extent that it is not caused by the fault, negligence or lack of diligence of the charterer. This is an essential part of the "overlap" doctrine. As stated by Judge Brown in *Straits of Dover SS Co. v. Munson*, 95 Fed. 690, 692 (DCNY 1899):

"The reasonable inference as to the intention, to be drawn from these circumstances is, that the charterer should be authorized to make use of the vessel, at the rate agreed upon, for at least one complete voyage, taking any customary return cargo at the customary ports; and that any prolongation of the charter period in accomplishing the voyage and in taking a return cargo, *not caused through any negligence or lack of diligence of the charterer, or his agent*, must be deemed governed by Paragraphs 4 and 5 and not subject to any increased rates." (Italics added)

In *The Rygja*, 161 Fed. 106, 107 (C.A. 2 1908), the court referred to the foregoing case as follows:

"Judge Brown in a case of overlap construed such a provision to entitle the charterer to at least one round voyage of the character contemplated in the charter at the charter rate of freight, *unless the delay was due to his own fault*." (Italics added)

Thus the law is well settled that appellee will be liable in damages for any delay in the second voyage occasioned by appellee's fault.

C. The Redelivery of the Vessel Was Unreasonably Delayed 11 Days, 17 Hours and 15 Minutes by Reason of Appellee's Failure to Load the Vessel With Reasonable Diligence or Within a Reasonable Time Under the Circumstances at Bangor.

The only evidence in the record pertinent to the delay at Bangor is that the Vessel was not loaded within a reasonable time at Bangor, and that she was not loaded continuously 24 hours a day seven days a week as was the established custom in West Coast ports. Appellee neither pleaded any affirmative defense nor offered any evidence regarding this delay. Nevertheless the court below found that the redelivery of the Vessel to appellant "was not delayed by any inexcusable act or omission connected with the loading of her cargo at Bangor" (Finding of Fact VI, Tr. 60-61); and that appellee "exercised reasonable diligence in all the circumstances in its performance" of the charter party (Finding of Fact XVII, Tr. 64).

These findings are clearly erroneous in view of the uncontradicted and unimpeached evidence to the contrary.

1. *Appellee was bound under the charter party to load the Vessel within a reasonable time under the circumstances at Bangor.*

Where, as here, the charterer agrees to load and discharge the ship, and no time for loading or for discharge is specified in the charter party, the charterer impliedly agrees to load and discharge the ship in such time as is reasonable, in view of all the existing facts and circumstances, ordinary and extraordinary, legitimately bear-

ing upon that question at the time of her loading and discharge. *Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co.*, 77 Fed. 919 (C.A. 8 1896); *Donnel v. Amoskeag Mfg. Co.*, 118 Fed. 10 (C.A. 1 1902); *Hick v. Raymond*, (1893) A.C. 22 (House of Lords); see, Poor on Charter Parties 122 (4th Ed., 1954). The charterer must use reasonable diligence under the circumstances to provide a berth and have the vessel loaded or discharged. *The James H. Hoyt*, 1924 AMC 1108 (DC Mich.); *Hick v. Raymond*, (1893) A.C. 22 (House of Lords); *Ford v. Cotesworth*, L.R. 4 Q.B. 127, 5 Q.B. 544; *Taylor v. Great Northern Ry. Co.*, L.R. 1 C.P. 385; *Ashcroft v. Crow Orchard Colliery Co.*, (1874) L.R. 9 Q.B. 540.

Proof that the ship was delayed in loading beyond that time required to load in the customary manner throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the loading and his reasonable diligence thereunder *Cf.*, *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 77 Fed. 919 (C.A. 8 1896) ("... when a ship is to be unloaded, under ordinary circumstances, the customary method and the customary time in its port of delivery prove the reasonable method and the reasonable time, and measure the liability for detention, in the absence of countervailing evidence." *Id.* at 923).

2. *The evidence shows that Vessel was not loaded within a reasonable time and with reasonable diligence at Bangor.*

The Vessel arrived at Bangor and commenced loading at 1815 hours on Tuesday, October 17, 1950 (Tr.

188-189). Loading was not completed until 1130 on November 10, 1950 (Tr. 194), for an elapsed loading time of 23 days, 17 hours and 15 minutes. During that period no cargo was worked a total of 13 days, 21 hours and 45 minutes (Tr. 195), meaning that the Vessel was worked only 9 days, 19 hours and 30 minutes (including time out for meals). The Vessel was in fact, then, completely loaded in 9 days, 19 hours and 30 minutes, which fact alone establishes the reasonable loading time and indicates that the unreasonable delay was a total of 13 days, 21 hours and 45 minutes.

However Captain Craig, the Master of the Vessel and the only witness who was present at Bangor and observed the facilities available for loading, testified that the Vessel was not loaded within a reasonable time, and that "12 days would be a reasonable time for loading that cargo" (Tr. 195-196). Therefore appellant claims the difference between 12 days and the actual loading time, or 11 days, 17 hours and 15 minutes.

3. *The evidence shows that the Vessel was not loaded in the customary manner at Bangor, and appellee failed to offer evidence of circumstances excusing the delay.*

The established custom in West Coast ports was to load such ships continuously 24 hours a day 7 days a week (Tr. 189-190). In sharp contrast, the Vessel was loaded 24 hours a day for only the first three days. Then she was left idle for the full week end; then worked only one or two shifts a day for the ensuing five week days and left idle for another full week end; then worked only *one* shift a day for the ensuing five week days and

left idle for a third full week end; then worked only *one* shift a day for four and a half days until loading was completed (Tr. 190-194). At one time only one longshore gang worked the ship (Tr. 192), and another time all gangs stopped "awaiting cars" (Tr. 193).

That appellee recognized the custom of continuous loading is demonstrated by the fact that the Vessel was loaded continuously (excepting only a portion of one Sunday) at Mukilteo (Tr. 183-184), and discharged continuously at Buckner Bay (Tr. 185-186) and Kure (Tr. 209-210).

This proof placed the burden on appellee to show circumstances excusing the delay and its reasonable diligence thereunder. *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 77 Fed. 919 (C.A. 8 1896). This appellee wholly failed to do, notwithstanding the fact that Bangor is only a few miles from Seattle and presumably witnesses and records were available. The obvious reason for this omission is that there were no excusatory circumstances. Certainly Korean reverses did not affect the loading at Bangor, since the Chinese did not enter the Korean war until late November after loading was completed (Tr. 299-300, 333). There is some discussion by Colonel Sanderson about the problem of "mass detonation" in handling explosives, *i.e.*, that only a given amount of explosives may be safely concentrated in a given area in a given time, which factor could slow down loading. However, that discussion was limited to the situation in Japan. Colonel Sanderson was not in Bangor at the time (Tr. 297), and there is no evidence whatsoever that there was a problem of mass detonation

at Bangor, nor that the general problem of mass detonation in any way contributed to the delay at Bangor.

Counsel for appellee (but not any witness) suggested that stevedores may not have been available, or that the cargo may not have been ready (Tr. 243-244). However, the unavailability of stevedores will not excuse the charterer from delay. As stated by Judge Hunt in *W. R. Grace & Co. v. Hansen*, 273 Fed. 486, 492 (C.A. 9 1921):

“The argument that the stevedores were at fault in loading with only one gang, and that the progress in loading was not satisfactory, does not help the charterers, inasmuch as it was their duty to have provided additional stevedores, or otherwise to have made provision for the expedition of the work of loading.”

And it is a basic principle of charter party law that the charterer is bound to have his cargo ready for loading.

“In general, however, there is an absolute obligation on the part of the charterer to have the cargo ready at the port of lading, and a delay in bringing it there is not one of the circumstances to be considered in determining whether the charterer has loaded the vessel within a reasonable time.” MacLachlan, *Law of Merchant Shipping*, 416 (6th ed., 1923).

4. Appellee did not even plead a defense to the delay at Bangor.

Finally on this point, it is significant that appellee did not even plead any defense to the delay at Bangor. Appellee's affirmative defenses relate only to the delay at Kure (Tr. 51-54), and the alleged failure of appellant

to demand a revision of the charter rate of hire under Article 29 of the charter party (Tr. 46-50).

Since the uncontradicted and unimpeached evidence in the case, and the only evidence on this point, conclusively establishes that the redelivery of the Vessel to appellant was delayed by at least 11 days, 17 hours and 15 minutes by appellee's failure to load the Vessel with reasonable diligence or within a reasonable time under the circumstances at Bangor, the findings of the court below to the contrary are clearly erroneous.

D. The Redelivery of the Vessel to Appellant Was Unreasonably Delayed 29 Days, 22 Hours and 20 Minutes by Reason of Appellee's Failure to Provide a Berth and Discharging Facilities For and Discharge the Vessel With Reasonable Diligence or Within a Reasonable Time Under the Circumstances at Kure.

The overwhelming weight of evidence in the record is that the port of Kure was congested with other MSTs ships voluntarily ordered there for discharge by appellee, and that the Vessel could have been discharged immediately upon arrival but for that congestion and a shortage of storage facilities ashore. Nevertheless the court below found that the Vessel was discharged "as soon as discharging facilities were available, in accordance with military priorities then in effect and the urgent needs of the armed forces engaged in hostilities in Korea" (Finding of Fact IX, Tr. 61); and that appellee "exercised reasonable diligence in all the circumstances in its performance" of the charter party (Finding of Fact XVII, Tr. 64).

These findings are clearly erroneous in view of the overwhelming weight of the evidence to the contrary.

1. *In determining what a reasonable time is, congestion caused by the charterer ordering too many ships into the port may not be taken into account.*

The charterer must use reasonable diligence under the circumstances to provide a berth or other facilities for discharge and discharge the ship within a reasonable time. This principle was early established in *Postlethwaite v. Freeland*, 5 App. Cas. 599, 608. Then, in *Wright v. New Zealand Shipping Company*, (1878) 4 Ex. D. 165, 40 L.T. 413, the rule was announced that in determining what a reasonable time is, congestion caused by the charterer ordering too many ships into the port will not be taken into account. Lord Judge Cotton stated the rule as follows:

“In my opinion, for the purpose of determining what was a reasonable time on the contract between the plaintiff and the defendant, the defendant is not entitled to excuse delay that would otherwise be inexcusable by saying, ‘I sent so many ships to that port that the lighters that I engaged did not enable me to unload your ship within what would otherwise (and if I had not taken those other ships to that port) have been a reasonable time.’ In my opinion he cannot excuse his delay by claiming an allowance for the time during which he used his lighters, which could have been used for that ship, for the purpose of unloading other ships sent by him to the port.”

And in *Hick v. Raymond*, (1893) A.C. 22 (House of Lords), the House of Lords conclusively settled the point by holding that the charterer must discharge the vessel within a reasonable time under the actual circumstances obtaining, except that circumstances caused

or contributed to by the charterer or consignee cannot be taken into account.

The American rule is the same. In *W. K. Niver Coal Co. v. Cheronea SS Co.*, 142 Fed. 402, 411 (C.A. 1 1905), the court stated as follows:

“However, even if there had been an insufficiency of wharves or of barges or lighters, that was not a matter beyond control, but a condition to which the consignee had contributed. It had four large coal steamers involved in these appeals, voluntarily bunched together in the port at Boston; and the case of the steamship LAKE MICHIGAN, disposed of at our last term, shows another even larger steamer for which it was responsible, in port at the same time. * * * Thus, while the Roath was delayed, more than her entire cargo was discharged into lighters from other steamers chartered or controlled by the W. K. Niver Coal Company. Its own vessels, or vessels under its control, were given facilities which, if concentrated on the Roath, would have discharged her seasonably.

“The same course of reasoning is to be applied to all the steamers involved in the appeals before us. Each of them had her own rights as against the W. K. Niver Coal Company. They were not under a joint contract, but each was under a separate contract; so that each was entitled to assert her rights independently of the others, although the consignee had so involved itself by its several charters, or by charters on its account, that it was unable to do its duty by any one of them. *A condition of affairs brought about by a contractor on the one part does not relieve him from his obligation to each of the contracting parties on the other part, acting severally, because the condition resulted in embarrassing*

all of them at the same time. To consent to any other rule would permit a contractor to relieve himself of his contracts in proportion to the number of parties he might involve in his own embarrassment by virtue of his own separate voluntary acts." (Italics added)

2. A charterer may not delay his chartered vessels by using them to supplement his onshore storage capacity.

The charterer may not use the chartered vessels as a storage warehouse to supplement his own onshore storage capacity. At least, he may not do so at the charter rates if the market rate of charter hire advances during the meanwhile. In this regard *Leonard v. William G. Barker Co.*, 214 Fed. 325 (DC Mass. 1914), is pertinent. The court there said:

"It is contended by the libelant that the custom of awaiting turns will not, as against a vessel awaiting her turn, excuse the charterer from liability for delay caused by his failure to discharge preceding vessels with due diligence; and it is clear that, if this were not so, the custom might lend itself to a great hardship upon lumber vessels, for a lumber laden schooner might be kept a long time awaiting a berth, *while the consignee held vessels ahead of her for the mere purpose of storehouses.* The custom of awaiting turn cannot be invoked for the mere convenience of the charterer or consignee in the conduct of his business." (Italics added)

In this connection it should also be noted that when the charterer consigns the ship to another for discharge, he becomes liable for the acts or omissions of the consignee, *Donnell v. Amoskeag Mfg. Co.*, 118 Fed. 10 (C.A. 1, 1902); Poor on Charter Parties 122 (4th ed.,

1954) ; and likewise for those of his agent for discharge. *Lind v. United States*, 44 Ct. Clms. 558 (1909). Therefore, if appellee's acts as a charterer are deemed limited to those of the MSTS, appellee is nevertheless bound by the Army's acts as consignee or agent for discharge.

3. *The delay at Kure was directly caused by the congestion voluntarily created by appellee and contributed to by the lack of storage capacity ashore.*

The congestion of the port was voluntarily created by appellee. The Army officers in charge at Kure testified that all of the ships in Kure during the months of December, 1950, and January, 1951, were MSTS ships (Tr. 352, 354). Therefore the congestion was created by appellee having ordered too many ships into Kure during this period. Although the *reason* appellee did so might have been that reverses in the course of the war closed Korean ports, the *cause* of the congestion was appellee's own decision to order the number of ships into Kure that were actually ordered there. Appellee could have ordered the ships into any Japanese port, or back to the United States, or to Okinawa, but instead voluntarily chose to order these ships into Kure, thus burdening the discharge facilities of that port beyond their capacity. In addition, there is no evidence that any ship in Kure at that time except the Vessel was originally destined for a different port, Korean or Japanese. Insofar as congestion is concerned, this case falls squarely within the doctrine of *Wright v. New Zealand Shipping Company*, (1878) 4 Ex. D. 165, 40 L.T. 413, *supra*, and *W. K. Niver Coal Company v. Cheronea SS Co.*, 142 Fed. 402 (CA 1 1905), *supra*. The case is to be deter-

mined as if no other MSTS ships were in the harbor at Kure, and under such circumstances it is obvious that the Vessel could have been discharged immediately if there were adequate storage facilities ashore. If there were inadequate storage facilities ashore, that is, of course, a condition for which appellee is liable under *Leonard v. William G. Barker Co.*, 214 Fed. 325 (DC Mass. 1914), *supra*.

It should be noted that the lack of storage capacity for the 105 and 155 mm. howitzer ammunition and the congestion were conditions that antedated the reverses in the Korean war (Tr. 301, 346). The Chinese entered the war in late November, 1950 (Tr. 299-300, 333). Prior to that time the lack of storage facilities for such ammunition in Japan had become acute (Tr. 307), as is evidenced by the action of the Army in surveying the storage facilities in and about Kure for use before Thanksgiving of 1950 (Tr. 310-311, 316, 346, 353). And, as stated by Lieutenant Colonel Blust, the officer actually in command at Kure (Tr. 347-348):

“There were many, many ships having nothing but 155’s and there was a lot in storage.”

He further testified as follows (Tr. 351-252):

“Q. But do you remember quite clearly that during the period December, 1950, there were lots of 105 and 155 artillery ammunition around?

A. Well, that is my recollection, yes, sir. *We were always heavy on that. That seemed to be the biggest thing coming over.*” (Italics added)

Major Scales testified as follows with regard to the available storage facilities (Tr. 340-341):

“Q. Do you know if the Japanese ammunition

dumps at Eta Jima and Kure were rehabilitated and ready for ammunition storage on December 1st?

A. On December 1st?

Q. Yes, by December 1st.

A. By what standards do you mean? Do you mean by the standards we would normally accept within the Ordinance Corps for the movement of ammunition and the acceptance of ammunition, or by what?

Q. Were they ready to take and did they commence storing ammunition in them?

A. They took *some* ammunition. They received ammunition, yes, sir.

Q. Were they still in the process of doing further rehabilitation?

A. They were rehabilitating ammunition depots within Japan until 1953, sir, yes.

Q. I want to be a little more specific particularly with respect to the facilities right there in and around Kure. Do you know whether they were still in the process of rehabilitating those Japanese depots in December, 1950?

A. *I would say yes, sir, such things as rail lines, revetments and things like that had been demolished under the occupation policy.*" (Italics added)

Colonel Sanderson testified as follows (Tr. 310-311):

"The port command had no responsibility. I had the operational responsibility, the operation of the port itself through what we call a subport headquarters. Lieutenant Colonel Blust was the officer I recommended to make the original survey of the port of Kure, and I believe this was shortly before Thanksgiving or around Thanksgiving, to look

into the port of Kure as an ammunition handling port.

“Colonel Blust went down there and came back with a report. He proceeded to headquarters in Yokohama and made his report there with ordinance, of course, and the recommendation with the British forces there how much could be handled. *Nothing had been done prior to Colonel Blust’s trip with the rehabilitation of the Japanese ammunition depots.* If the depots had been opened up and had all their equipment in operable condition, discharge naturally could have been expedited, because you could handle more, but because they had not been, *the port of Kure for some time could not be counted upon as a full fledged ammunition port due to the hinterland facilities not having been rehabilitated in five years, since 1945 or prior thereto.*” (Italics added)

Captain Craig, the Master of the Vessel, was advised at the time that lack of storage facilities was one reason for the delay at Kure. He testified as follows (Tr. 211):

“Q. Now, did Captain Robertson advise you why you were not discharged for the period that you lay in the harbor?

A. Well, he told me that there were other ships that they wanted the cargo from right away.

Q. Did you receive any further advice from anyone in the Harbor Master’s office as to why you were not discharged?

A. Well, there was an assistant there, a master sergeant, I believe he was, and I had a talk with him one day in the office there, and he—he *did tell me that they were making a new ammunition dump and that we wouldn’t be discharged until*

that was ready to receive the ammunition.” (Italics added)

(Captain Robertson was the actual subport commander stationed at Kure—Tr. 351.)

The evidence is quite clear that at some time prior to the entrance of the Chinese into the war, a serious shortage of ammunition storage space occurred in Japan. It is further quite clear that a great over-supply of 105 and 155 mm. howitzer ammunition was already stored in Japan by November. Notwithstanding this oversupply and lack of storage facilities, the Vessel was loaded with approximately 7,000 tons of 105 and 155 mm. howitzer ammunition, which loading was not completed until November 10, and was sent to Japan for discharge. By the time she arrived, there was not only a shortage of storage facilities, but in addition appellee had created a serious condition of congestion in the port of Kure by ordering too many ships into that port for discharge. It is also clear that had there been adequate storage facilities ashore at Kure, and had the congestion not existed, the Vessel would have been discharged at Kure immediately upon her arrival.

Certainly a 30-day delay before discharge is *ipso facto* unreasonable and requires appellee to come forward with a detailed explanation. Yet each of appellee's witnesses denied any knowledge of the Vessel or her delay in Kure (Sanderson, Tr. 333; Scales, Tr. 336, 339, 342-343; Blust, Tr. 350, 354). As a matter of fact, during this delay Colonel Sanderson was in Kure only once (Tr. 314), and Major Scales not at all (Tr. 340). Only Lt. Col. Blust was there frequently (Tr. 354).

There is no evidence that the Vessel was discharged in her turn even under the "priority of cargo" discharge system in effect.

However, the evidence overwhelmingly establishes that there would have been no delay if the port had not been congested with other MSTS ships and had adequate storage facilities been available. Therefore, since the redelivery of the Vessel to appellant was delayed 29 days, 22 hours and 20 minutes by appellee's failure to provide a berth and discharging facilities for the Vessel with reasonable diligence or within a reasonable time under the circumstances at Kure, the findings of the court below to the contrary are clearly erroneous.

E. Neither the Delay at Bangor Nor the Delay at Kure Was Excused Under the "Restraint of Princes" Exception in the Charter Party.

The court below both found and concluded that the delays at Kure and Bangor were excused under the "restraint of princes" exception in the charter party (Findings of Fact XIII, XIV, XV, XVI, Tr. 62-64; Conclusion of Law III, Tr. 65).

1. *There is no evidence as to the cause of the delay at Bangor; therefore it cannot be said to have been caused by a "restraint of princes."*

As shown above, the delay at Bangor occurred prior to the entry of the Chinese into the Korean war and the consequent reverses of United States forces, and there is no evidence tending to show the cause of the delay at Bangor. Therefore the findings and conclusion referred to above are clearly erroneous insofar as they

apply to the delay at Bangor. Appellee totally failed in its proof on this issue.

2. *The proximate cause of the delay at Kure was the congestion created by appellee.*

The so-called "priority of cargo" discharge system contained two criteria. The first was priority of *cargo*. The Army reviewed its needs from day to day and issued instructions as to which types of ammunition and other cargo were most needed, and ships containing such cargo were unloaded out of turn regardless of other ships waiting in the harbor. Only when all ships having such cargo were unloaded did a criterion based upon priority of the ship itself come into play. Even then, the time of the ship in the *port* was not controlling; the controlling factor was the time the ship had been in the entire *theater of war*. It is apparent, however, that this latter factor was really not important. As stated by Lt. Col. Blust (Tr. 349):

"It wasn't really the ship, it was the *cargo* which had priority." (*Italics added*)

He further testified (Tr. 351):

"Q. You said priorities changed daily. I take it you meant depending upon the demands?

A. That's the only assumption you could make, demands from the field forces through headquarters.

Q. Artillery shells might be high and next week's rockets could be high, or even next day rockets might be high?

A. We didn't know what it would be on that low level. If they told us to unload rockets, we would unload rockets.

Q. And that was a shifting system, there was nothing flexible (*sic*) about it? (Should be "inflexible.")

A. If we had rockets to unload and we were unloading 105's on another ship, we would kick them out. We have unloaded overstowed cargo and put it back on a ship."

It is apparent that, had there been no congestion, no "priority of cargo" discharge system would have been needed, and the Vessel would have been discharged immediately upon her arrival. This being so, it is likewise apparent that the proximate cause of the delay at Kure was the congestion of MSTs ships created by appellee, not the discharge system used to determine which ship would first be unloaded. Since it is the charterer that here asserts the exceptions clause as a defense, it has the burden of proving that the delay was within the scope of the exception. *The Aquarius*, 44 F. (2d) 805 (DCMd. 1930). Furthermore, the charterer must prove that the excepted condition was the *sole cause* of the delay. As stated in *W. R. Grace & Co. v. Hansen*, 273 Fed. 486, 494 (C.A. 9 1920):

"The question then arises: Were the charterers prevented from furnishing the cargo as called for by the charter party *solely* by reason of causes beyond their control and within the exceptive causes of the charter party?" (Italics added)

And in *Hellenic Transport SS Co. v. Archibald McNeil and Sons Co., Inc.*, 273 Fed. 290, 296 (DC Md. 1921), the court said, in dealing with the "restraint of princes" exception in a charter party:

"In order that the contingencies specified in them shall constitute a good defense, performance

must have been thereby rendered in a practical sense impossible, illegal or dangerous (Citations omitted). It is not sufficient that the happening of one of them adds materially to the difficulties and embarrassment of the parties relying on it, if nevertheless it is still possible to perform. (Citations omitted)

“It is true that the restraint may not have been directed against the ship or the goods. It may have had other objects as, for example, the prevention of ingress or egress to or from a besieged or blockaded place, and in that sense may have been indirect. (Citations omitted) *It must, however, have been the proximate, as distinguished from the remote cause.* (Citations omitted) *If by itself it could not have prevented performance, it will not excuse merely because, in combination with non-excepted clauses, it did so.* (Citations omitted)

“ * * *

“It is no light matter to weaken the binding force of mercantile contract, and the burden is heavily on him who asks that it be done. After the charterer, and others, who wished to ship coal abroad, had hired more ships than could be loaded with reasonable promptness, somebody was bound to lose heavily. (Citations omitted) Such miscalculations are always costly. They are less likely to be repeated if those who make them find themselves unable to shift the burden to other shoulders.” (Italics added)

It seems apparent that, had there been no congestion, and had onshore storage facilities been adequate, the so-called “restraint of princes” would not in any way have interfered with the immediate discharge of the ship upon arrival at Kure. Therefore, it cannot be said

that the alleged "restraint of princes" was the sole proximate cause of the delay, but rather it is apparent that the real cause of the delay was the combination of congestion in the port and lack of storage facilities ashore.

3. *The "priority of cargo" discharge system was not a "restraint" as that term is used.*

As a factual matter, no actual restraint was ever imposed on the discharge of the Vessel. Rather, it was merely the fact that the Army selected cargo aboard other ships as being more desirable for immediate discharge that resulted in the discharge of those other ships before the Vessel.

There is no evidence whatsoever that the Army authorities refused any request of the MSTS for the immediate discharge of the Vessel, or that the MSTS even made such a request. However, the testimony of Colonel Sanderson clearly indicates that the Vessel would have been discharged by the Army, regardless of the so-called "priority" of her cargo, had the MSTS advised the Army that the charter period had expired. In this regard Colonel Sanderson testified as follows (Tr. 328) :

"Q. So, as a general proposition port authorities who controlled the discharge of the vessels had no information whatsoever as to whether or not charters had expired or were about to expire or what terms vessels were chartered for?

A. There were two ways we found out or we would be informed, and that would be through the MSTS representative who would be in Yokohama, who would advise the transportation section of the

Japanese Logistical Command of certain conditions or whether the master of the vessel, when he made his port of call, advised the port authorities, who were responsible for his discharge, that his charter was to run out a certain date and he wanted his ship discharged, etc. That would be the only two ways we would know about charters running out."

Inasmuch as appellee had the burden of proving a restraint, it seems that the obvious lack of evidence of any restraint of any sort refutes the contention that the delay was attributable to a restraint. Proof of the so-called "priority of cargo" discharge system is not the equivalent of proof of a restraint, especially since Colonel Sanderson's testimony indicates that the Vessel would have been discharged promptly despite the "priority of cargo" discharge system had a proper request therefor been made by the MSTs.

4. The "priority of cargo" discharge system was not a restraint "of princes" as that term is used, i.e., it was not a sovereign act.

It is true that the United States is not liable as a contractor for delay caused by its sovereign acts. This was early established in *Deming v. United States*, 1 Ct. Clms., 190 (1865), and *Jones v. United States*, 1 Ct. Clms. 385 (1865). The rule was concisely stated in *Jones v. United States*, *supra*, as follows:

"Whatever acts the Government may do, be they legislative or executive, *so long as they be public and general*, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with individuals." (Italics added)

The question, then, is whether appellee (or its consignee or agent), in establishing the so-called "priority of cargo" discharge system, was acting as a sovereign or as a contractor. Was the priority of discharge system a "public and general" system?

There is absolutely no evidence in the record tending to show that the so-called "priority of cargo" discharge system was applicable to any ships other than those operated by or for the MSTs. There is no evidence tending to show that commercial ships arriving at Japan during the period involved were affected by the so-called "priority of cargo" discharge system. In fact, it is clear from the testimony of appellee's own witnesses that non-MSTs ships were *not* bound thereby. Colonel Sanderson testified that had a British ship come into the port during that period, it would have been given priority of discharge over MSTs ships (Tr. 323).

Appellee's own witnesses further testified that the so-called "priority of cargo" discharge system was not primarily based upon priority of ships, but was based upon priority of cargo. It was a shifting, flexible designation of those types of cargo that were most needed by appellee (or its consignee or agent) from time to time for the supply of its personnel. In this regard appellee stands on no different footing than the ordinary commercial charterer who, having ordered too many ships into the harbor for discharge, unloads those containing cargo immediately saleable notwithstanding the fact that other ships carrying cargos not immediately saleable had arrived in port first. It seems obvious that appellee (or its consignee or agent) acted as a contractor

in selecting which ships were to be discharged first, rather than as a sovereign, since the system affected only ships under contract to the MSTs, and was based upon appellee's own needs for certain cargo rather than any public and general criteria. Here the MSTs agreed to discharge the vessel, and delegated its duties so to do to the Army personnel at Kure. Under the circumstances the Army personnel acted as the consignees or agents of the MSTs, and appellee is liable for all acts or omissions of the MSTs or its consignees or agents performed in a non-sovereign capacity. *Lind v. U.S.*, 44 Ct. Clms. 558 (1909) ; *Donnell v. Amoskeag Mfg. Co.*, 118 Fed. 10 (C.A. 1 1902).

5. *In any event, appellee could have avoided the delay by the exercise of ordinary diligence.*

There is no evidence whatsoever that the MSTs made any application or request to the Army personnel at Kure or any other proper effort to discharge the Vessel, although, according to the testimony of Colonel Sanderson quoted above, it is apparent that the Vessel would have been granted immediate discharge had such a request been made by the MSTs. On the other hand, the testimony of Captain Craig is clear that the MSTs made no effort whatsoever even to contact the Vessel until after discharge had commenced. He testified as follows (Tr. 215-216):

“Q. Captain, in case I haven't made it clear now, the Army had its own discharge facilities and harbor facilities there at Kure, is that correct?

A. Yes.

Q. Was there an MSTs representative there?

A. Not stationed at Kure, no.

Q. Did any MSTS representative contact you at Kure?

A. *Not until late in January when I got word to start discharge, and then the representative came down from Kobe.*'' (Italics added)

It is clear that neither the Kobe MSTS representative nor the Army had any knowledge that the original 120-day charter period had expired on December 2, 1950, before the Vessel arrived at Kure. During the months of December, 1950, and January, 1951, there were at least 12 other ships in the harbor at Kure, all of which were under time charter to the MSTS, and all except one of which were owned by the United States Maritime Administration. Each and every one of those ships were chartered for the same initial period as was the Vessel. All except one of those ships were delivered to the MSTS *after* the delivery of the Vessel, so that their initial term under their respective charters expired subsequent to that of the Vessel. Each and every one of the charter parties applicable to those 12 other ships contained an option for a 120-day extension in favor of appellee, an option which had been deleted from the charter party applicable to the Vessel.

Under these circumstances it is obvious that the Army and MSTS representatives erroneously assumed that there was no need to expedite the discharge of the Vessel because the charter term would simply be extended for an additional 120 days along with the charter term of all the other ships. This is confirmed by the fact that Captain Craig was advised by an United States ammunition inspector, just prior to the commencement of discharge, that "he had received orders

from the Logistics Command in Yokohama to get the ship discharged as quickly as possible and get her back to Seattle as the charter had expired.” Certainly this was not the exercise of due diligence, where the charterer made no effort to have the Vessel discharged and, in fact, did not even contact the Vessel itself, until advice was received from a different source that the charter had expired. That the Vessel was then immediately discharged merely confirms the fact that the Vessel would have been given immediate discharge at any prior time by the Army personnel at Kure had a special request therefore been made by the MSTs.

Appellant urges that the delay in awaiting discharge at Kure for 29 days, 22 hours and 20 minutes was not caused and is not excused by restraint of princes, and the findings and conclusions of the court below to the contrary are clearly erroneous.

F. This Action Is Not Barred by Failure of Appellant to Demand a Revision of the Charter Rate of Hire Under Article 29 of the Charter Party, for the Following Reasons:

1. *Article 29 applies only to a revision of the rate of hire during the rightful term of the charter, and not to a claim for damages for wrongful delay in redelivery of the Vessel.*

Brief reference to Article 29(a) in its entirety (Tr. 102-109) makes it apparent that it was intended only to provide for an adjustment in the rate of charter hire during the agreed charter term caused by such factors as increased operating costs (other than wages, which are provided for in Article 29(b)), and not to a claim for damages for wrongful delay in redelivery of the

Vessel. Article 29(a)(2) provides in part as follows (Tr. 102):

“At any time subject to the limitations specified in this Article, either the charterer or the contractor may deliver to the other a written demand that the parties negotiate to revise the rate of hire *under this Charter Party.*” (Italics added)

This Article must be examined in light of the fact that the charter party form originally contained an option for a 120-day extension in favor of appellee (Tr. 98-99). Article 29 is geared to the basic idea that appellee could and undoubtedly would extend the charter period from time to time, in which event significant changes in the operating costs might require a revision of charter hire. However, the 120-day extension option was crossed out and eliminated from this particular charter party when the same was executed.

The theory of appellant's action is that appellee breached the charter party by wrongful delay in redelivering the Vessel, for which delay appellant is entitled to such damages as the law allows. It is the law that provides the measure of damages, since none is specified in the charter. The measure of damages is the difference between the market rate of charter hire and the charter rate of hire during that portion of the overlap period caused by wrongful delay. *Munson SS Line v. Elswick Steam Shipping Co.*, 207 Fed. 984 (DCNY 1913), affirmed per curiam, 214 Fed. 84 (C.A. 2 1914). In legal theory appellant does not request an increase in the rate of charter hire, but rather seeks damages for breach of contract, which damages the law measures by comparing the charter rate of hire with the market rate of

charter hire during the period involved. Under no circumstances could this conceivably be deemed a request for an increase in the rate of charter hire subject to the provisions of Article 29 of the charter party.

2. *In any event appellant made a sufficient demand for negotiation under Article 29 upon the contracting officer on January 19, 1951.*

The letter written to the contracting officer on January 19, 1951 (Ex. 6, Tr. 119-120), was sufficient compliance with Article 29(a) in any event. The only formal requirements of the "demand" stated in Article 29(a) are that it demand negotiation to revise the rate of hire, specify the effective date of the revision, and state briefly the grounds therefor. In this case the letter demanded an increase effective after the initial 120-day charter period, on the ground that the market rate of hire had advanced, and clearly demanded negotiations since it specified agreement as to amount at a later date.

There is no evidence in the record as to whether or not the data requested in Article 29(a)(3) accompanied the letter, since appellee did not assert this as a defense (Paragraph XIV of amended answer, Tr. 50). In any event, no penalty was attached to such a failure, since under Article 29(a)(5) the matter would become a dispute under Article 32 30 days after the data is *required* to be filed, whether or not it is filed.

3. *By its terms Article 29 is merely a variety of arbitration clause, the benefits of which were waived by appellee by denying liability under the contract.*

Article 29(a) is simply a variety of arbitration clause. The parties agreed that upon the request of

either party they would negotiate for an adjustment in the charter hire, and that failing agreement the matter becomes a dispute under the disputes clause. Throughout the negotiations preceding this lawsuit, appellee has consistently denied any liability under the contract for the delayed redelivery of the Vessel. The contracting officer rejected appellant's voucher submitted to obtain payment of the difference between the market rate and charter rate of hire during the overlap period (Ex. 7, Tr. 121). The contracting officer later denied that he had any authority to consider appellant's claim (Ex. 8, Tr. 122-123). The Navy Accounts Office and the Comptroller General denied that appellee was liable to appellant for breach of contract or otherwise (Ex. 10, 12; Tr. 126, 130). Under these circumstances the arbitration clause is no defense under the doctrine of *E. I. duPont de Nemours & Co. v. Lyles and Lang Construction Co.*, 219 F.(2d) 328 (C.A. 4 1955). In that case a subcontract contained a limited disputes clause. The court held that failure to resort to the disputes clause was not a defense to the action, stating in part as follows:

“Defendant has never asked that any dispute of fact be referred under this section of the contract, but has merely pleaded the same in bar of plaintiff's right to recover in an answer in which all liability under the contract is denied . . .

“ * * *

“Even if it be considered that there are some disputes of fact in the case covered by the Disputes Clause, we think it clear that defendant has waived the right to rely on it. Not only has it not been invoked for the settlement of any disputes either before or after the institution of the litigation, but it

appears also that in the course of negotiations as to the amounts due on account of termination the representative of defendant told the representative of plaintiff 'that if Lyles and Lang did not feel they could settle within the bounds set forth, that they would have to resort to legal action'; . . .

“ * * *

“The Disputes Clause is, of course, a limited agreement to arbitrate; and it is quite generally held that the right to rely upon an arbitration agreement contained in a contract is waived by denial of liability under the contract. *The Atlanten*, 252 U.S. 313; *Jones v. Fox Film Corp.*, 68 F.(2d) 116, 117; *Home Insurance Co. v. Scott*, 46 F.(2d) 10, 13, reversed on other grounds 284 U.S. 177; *Mitsubishi Shoje Kaisha v. Nicolau*, 38 F. Supp. 156, 157; *Wallace v. German American Insurance Co.*, 41 Fed. 742; . . .”

Since Article 29 is not applicable to a claim for damages for delay, and since a demand in compliance therewith was made in fact, and since the conduct of appellee constitutes a waiver of any rights thereunder, the findings, conclusions and decree of the court below are clearly erroneous insofar as they are based upon that Article.

G. Appellant's Damages Should Be Fixed at the Rate of \$666.67 per Day for 41 Days, 15 Hours and 35 Minutes Wrongful Delay, for a Total of \$27,766.35.

This is an admiralty appeal in which this court has the power finally to dispose of the case by entering a decree awarding appellant its damages. *Menefee v. W. R. Chamberlin Co.*, 183 F.(2d) 720 (CA 9 1950).

The measure of damages for wrongful delay is the

difference between the charter rate of hire and the market rate of charter hire during the period by which the overlap was extended by the delay. *Munson S.S. Line v. Elswick Steam Shipping Co.*, 207 Fed. 984, 987 (DC NY 1913), affirmed per curiam 214 Fed. 84 (C.A. 2 1914); *Edward Munch*, 1927 A.M.C. 272 (C.A. 2); *Dampskibs Aktieselskabet Thor v. Tropical Fruit Co.*, 281 Fed. 740 (C.A. 2 1922).

The total delay complained of on this appeal amounts to 41 days, 15 hours and 35 minutes. Counting backwards from the actual date of redelivery, February 12, 1951, at midnight, it appears that the Vessel should have been redelivered on January 2, 1951.

Mr. Comyn, a well-qualified expert witness who has been in the charter business for many years, testified as follows regarding the market rate of charter hire (Tr. 159-160):

“Q. (By MR. KNUDSEN): At what rate could the vessel have been chartered, time chartered, under terms and conditions substantially equivalent to MST 197 had she been available for delivery to the charterer in the latter part of December, '50, or January, '51?”

A. The time charter rate would have been somewhere between \$4.75 on the dead-weight and \$5.00 on the dead-weight.”

He further testified that the rate was \$5.00 per ton by January 10th; \$5.50 per ton by January 31st; and \$6.00 per ton by February 12th (Tr. 171-172). Mr. Comyn also testified that employment would have been available for the Vessel had she been redelivered in early January, 1951 (Tr. 159).

The rate per dead-weight ton is converted to a per-diem rate by multiplying the rate by the dead-weight tonnage of the ship, in this case 10,750 dead-weight tons (Tr. 97), and dividing the result by 30 (Tr. 160). \$5.00 per dead-weight ton is \$1,791.67 per diem.

The charter rate was \$1,125.00 per diem (Tr. 98). Therefore the difference between the charter rate and the market rate of hire on January 2, 1951, when the Vessel should have been redelivered and available for re-chartering, was \$666.67 per diem. Applying this difference to the total wrongful delay of 41 days, 15 hours and 35 minutes fixes appellant's damages at \$27,766.35.

In addition, under the Suits in Admiralty Act appellant is entitled to interest at 4% per annum on the above amount from the date the libel was filed, February 9, 1953, 46 USCA §§ 743, 745, and to its costs in the court below, 46 USCA § 743.

VI. CONCLUSION

For the foregoing reasons, the final decree of the court below should be reversed, and the decree of this court entered awarding appellant recovery of its damages, interest and costs in the court below from appellee.

Respectfully submitted,

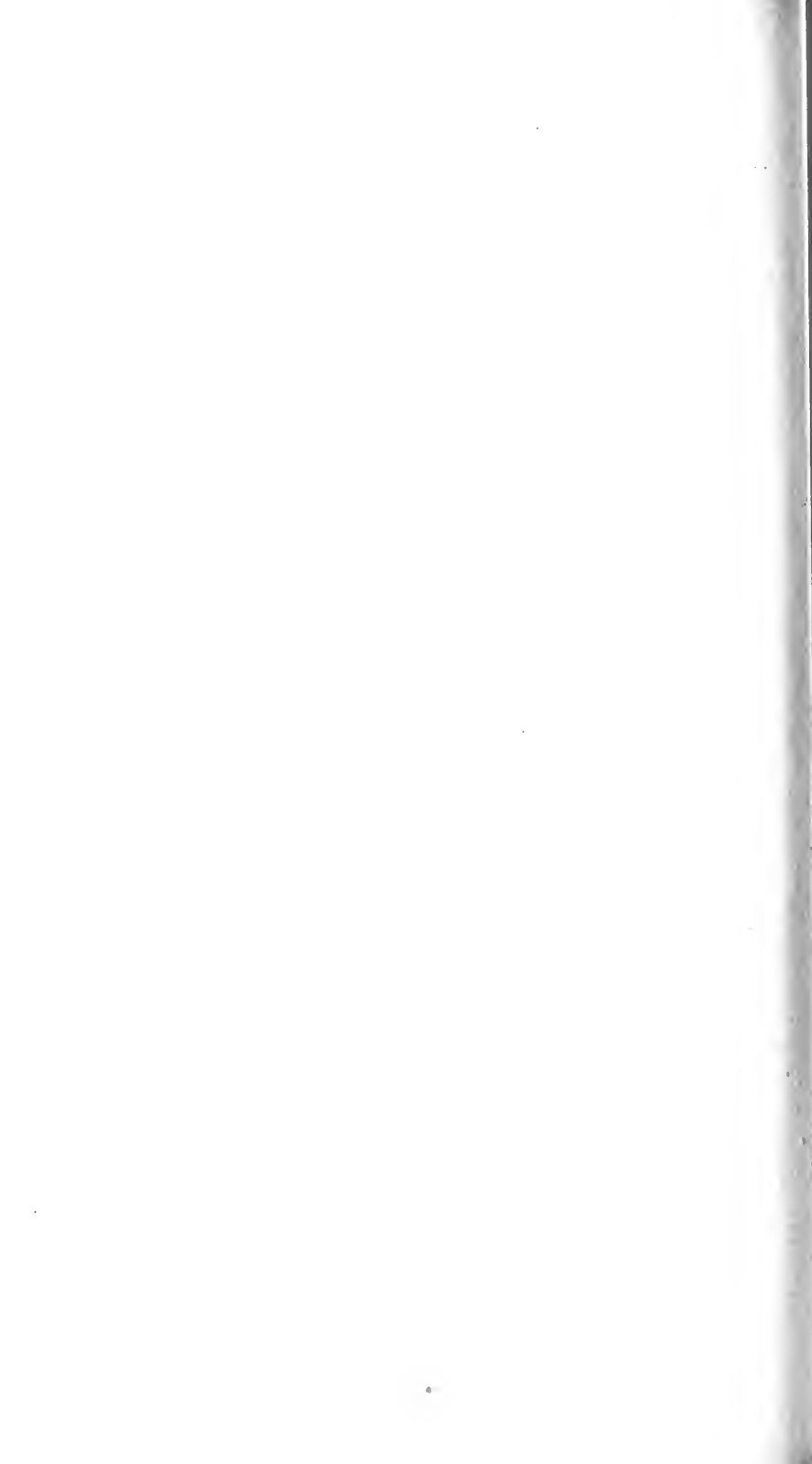
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No. 15,004

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WESTERN CANADA STEAMSHIP CO., LTD.,
Libelant-Appellant,

VS.

UNITED STATES OF AMERICA,
Respondent-Appellee.

**On Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

BRIEF FOR RESPONDENT-APPELLEE.

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No. 15,004

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WESTERN CANADA STEAMSHIP CO., LTD., <i>Libelant-Appellant,</i>	}
VS.	
UNITED STATES OF AMERICA, <i>Respondent-Appellee.</i>	

**On Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

BRIEF FOR RESPONDENT-APPELLEE.

JURISDICTION.

The jurisdiction of the District Court is founded upon Article III, Section 2 of the United States Constitution, Title 28, U.S.C. section 1333(1) and the Suits in Admiralty Act, Title 46 U.S.C. section 742, and was invoked by a libel (R. 3) claiming damages arising out of a time charter party under which libelant's vessel, the SS LAKE SICAMOUS, was operated for the United States.

The jurisdiction of this Court rests upon Title 28 U.S.C. section 1291 by reason of a notice of appeal

given over objection, on ultimate issues of the case, where it was shown that such witnesses lacked the knowledge of facts necessary to qualify them to testify to such opinions.⁵

STATEMENT OF THE CASE.

On June 25, 1950, hostilities broke out between the Republic of Korea and the northern portion of Korea which had been under occupation by Soviet Russia. The United Nations Organization promptly intervened and called upon its members to supply armed forces to assist the Republic of Korea in resisting aggression. In response to this call, the United States made its armed forces in the Far East available to the United Nations and committed them to assist, under the United Nations Command, in the defense of the Republic of Korea. The United Nations Command was given to General Douglas MacArthur, who was at that time the Supreme Commander of the Allied Powers occupying Japan. American forces based on Japan proceeded to Korea in fulfillment of the commitments made to the United Nations, and the American forces, as well as other forces of the United Nations, continued to be based in Japan and were supplied and supported from Japanese ports (Finding XIII, R. 62). Japan at that time, and at all times material here, continued to be under

⁵See: *McAllister v. United States*, 348 U.S. 19, 99 L.ed. 20, 1954 A.M.C. 1999; *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 88 L.ed. 967 (1944); *Walton v. Wild Goose Mining & Trading Co.*, 123 Fed. 209 (9th Cir., 1903); *United States v. McCreary*, 105 F.2d 297 (9th Cir., 1939).

occupation and control jointly by a group of sovereign occupying powers (Finding XI, R. 62) which had accepted the surrender of Japan at the end of World War II.⁶ Of all these facts the Court may and should take judicial notice. *Underhill v. Hernandez*, 168 U.S. 250, 42 L.ed. 456 (1897).

The requirements of war in Korea vastly increased the need for munitions in the Far East and the need for ships to carry them, and on July 7, 1950 the United States and appellant in this cause entered into a charter party (Lib. Exh. 1) with respect to libellant's vessel the LAKE SICAMOUS, under which the vessel was furnished fully manned with master, officers and crew, all the servants of appellant. The charter party provided in Article 5 (R. 98) that it was "for a period of about 120 days from the time of delivery of the vessel or to the termination of the voyage current at termination date". It is agreed by the parties that the charter party contemplated two round voyages from the west coast of the United States to the Far East with munitions of war (Finding IV, R. 59).

The charter party provided for charter hire at the rate of \$1,125 a day and provided expressly, in Article 29 (R. 102-105) for revision of the rate of hire under changed circumstances which would clearly include any substantial rise in market rates. Revision under Article 29 is made conditional upon the making of a request prior to the date when revision is to be

⁶See *Anglo-Chinese Shipping Co. v. United States*, 130 Ct. Cl. 361, 127 F. Supp. 553, 1955 A.M.C. 558, cert. denied 349 U.S. 938.

the United Nations forces (R. 300), and taxing the ability of the Japanese ports to supply the forces in Korea, to receive equipment evacuated from Korea and to accommodate ships diverted from Korean ports closed by the rapid advance of the Chinese (Finding XIV, R. 63; R. 300, 301, 310, 339, 346, 349).

In this emergency, in which United Nations forces were in retreat, there was the greatest need for ammunition for the Air Force, which could still operate against the enemy, using rockets, such as the LAKE SICAMOUS carried, against massed troops (R. 324). Such ammunition therefore had the highest priority (Finding XV, R. 63; R. 303, 337, 347-348). Artillery ammunition for the ground forces, which was primarily useful while advancing (R. 329), was therefore plentiful and of a very low priority (Finding XV, R. 63; R. 302, 337, 347-348). In this situation the portion of the LAKE SICAMOUS cargo consisting of 5-inch rockets was therefore of the highest priority and the remainder of the cargo, being ammunition for the ground forces, was of low priority (R. 302-303).

The Port of Moji was in use particularly for high priority cargo because it was closest to the Port of Pusan and there was a daily shuttle service between the two ports (R. 304-305). On December 10, 1950, shortly after her arrival at Moji, the LAKE SICAMOUS was berthed, and her high priority air force rocket cargo, amounting to 2,800 tons, was discharged by December 12 (R. 204). She was then sent to Kure

to discharge her low priority cargo and arrived at that port December 13 (R. 207).

The Port of Kure, to which the LAKE SICAMOUS had been sent, was the headquarters of the British Commonwealth Overseas Forces and was generally under the control of those forces and not under forces of the United States (Finding XII, R. 62; R. 308, 323). In the emergency, because of congestion already existing at Yokohama, Moji and other ports of Japan (R. 346, 307-308, 311-312), certain facilities of the Port of Kure had been made available by the British commander for the purpose of discharging cargoes of American vessels (Finding XII, R. 62). American officers under the command of Colonel Sanderson, who testified on deposition, had been stationed there to facilitate the discharge of American vessels using the port (R. 308, 311, 346, 350-351). The port had only one dock and one railroad track and was very limited in barges (R. 308). In addition to American vessels, Kure had to accommodate with its one pier the vessels supplying the British Commonwealth forces, which had priority over those supplying American forces (Finding XII, R. 62; R. 322-323).

Kure was severely limited in the rate at which it could handle ammunition ships, not only by limitations on its basic facilities of every kind, but further, and because of this, by limitations on the amount of ammunition which could be allowed to accumulate in one place or be transported through a city or other

populous area at one time (Finding XIV, R. 63; R. 308-309, 317-319, 326). As a consequence, it was not uncommon in December 1950 and January 1951 for vessels to have to lie from 60 to 80 days in Kure before being discharged (R. 310), and the waiting periods in other ports were as long and sometimes longer (R. 306, 310, 338, 349). In this situation, the LAKE SICAMOUS was required to wait for the discharge of her low priority cargo until January 12 when she was berthed and discharge commenced (R. 208). Discharge was completed on January 19 (R. 209). On January 19 the LAKE SICAMOUS left Kure and she arrived at Seattle February 10, 1951 (R. 217) and was redelivered to libelant February 12, 1951 (R. 219). Throughout the period of the entire voyage, up to the date when the LAKE SICAMOUS sailed from Kure for Seattle and redelivery, the record discloses no protest whatsoever by libelant against operations at Kure or elsewhere.

On January 19, 1951, J. H. Winchester and Company, as agents for libelant, addressed a letter (Lib. Exh. 6, R. 119) to the Military Sea Transportation Service stating that since the vessel "is being retained on charter for about six months" the owners intended to claim an increase in charter hire. Neither the libelant nor its agent, however, submitted any other or more definite request for revision of the rate of hire, nor any of the documents or information required by Article 29 of the charter party (R. 102-105) to accompany such a request (Statements VII, VIII, IX and X of Respondent's

Request for Admission of Facts and Genuineness of Documents, R. 28, and Libelant's Answers thereto, R. 31).

The letter of January 19, 1951 from libelant's agents could not be and was not treated as a proper request for renegotiation of charter hire since it did not comply with Article 29 of the charter party and, accordingly, libelant's subsequent bill for charter hire at an increased rate was rejected by the Government Contracting Officer (Lib. Exh. 7, R. 121). Libelant subsequently filed its claim with the Comptroller General and it was denied by him upon the grounds: 1, that the libelant acquiesced in sailing the vessel on voyage number two by failing to protest even though it knew that even under normal conditions the voyage would run beyond 120 days; 2, that the delay during the voyage was caused by war conditions which could not be anticipated when the voyage began, and 3, that the charter party provided its own method of compensating the owner by increasing charter hire and the owner had failed to comply with it (Lib. Exh. 12, R. 130).

Thereafter the libel in this case (R. 3) was filed February 9, 1953, claiming damages for "failure of respondent to redeliver the vessel within the period of the charter" (Article VII, R. 6). At the trial libelant relied upon alleged delay in loading at Bangor, alleged delay because of the routing to the Far East given the vessel by the Naval Control of Shipping Office (R. 197-202, 261-267) and alleged delay in discharge at Kure. It is no longer contended by

appellant, as indeed it could not be, in view of the plain language of the charter, and the authorities,⁹ that redelivery at the end of the second voyage, even though after 120 days, was a breach. What is more remarkable, however, is the abandonment, on this appeal, of appellant's contentions with respect to the routing of the vessel. This change of position, by which appellant waives claims of at least equal merit, such as it be, with the claims asserted here, affords an instructive example, as will be seen, of expanding the claim for damages by contracting the cause of action.

SUMMARY OF ARGUMENT.

This case arises from the attempt of a shipowner to secure more for the use of its vessel than the hire provided in the charter party after full performance of the charter and receipt of all its benefits, without any protest as to the actions which it now claims were breaches, but which were, in fact, the results of the acts of sovereign nations in the highest and most characteristic exercise of sovereign power.

I. Libelant seeks here to overturn the findings of the court below. Such findings may only be overturned on appeal where they are clearly erroneous. The findings complained of by appellant are founded

⁹*Straits of Dover S.S. Co. v. Munson*, 95 Fed. 690 (S.D. N.Y., 1899) aff'd 100 Fed. 1005 (2nd Cir.); *Dene Steam Shipping Co. v. Bucknall Bros.*, 5 Com. Cas. 372 (Q.B. 1900).

upon substantial and uncontradicted evidence and the refusals to find complained of are based upon absolute lack of admissible evidence, and such findings and refusals to find therefore, so far from being clearly erroneous, are clearly correct and inevitable.

II. The charter party, which contemplated carriage of munitions into a military zone, contained the unusual provision by which the usual "about 120 days" period was modified to extend to the end of the voyage current at the end of 120 days. The redelivery of the ship at the end of that voyage complied fully with the plain language of the charter so that there was, in fact, no breach by the Government. Not only did the charter provide in this way for the uncertainties of the voyage, but it also contained a provision, unusual in charters, for revision of charter hire to adjust any inequities which might otherwise result from the long and indefinite period. The charter party provided that appellant might request negotiation of a new rate to be effective on a date to be specified, not earlier than the request itself, such request to be accompanied by certain data and documents. No such request was ever made by appellant. Appellant therefore never became entitled to an increased rate of charter hire under the charter, and since there was no breach by appellee, appellant can not obtain an increased rate by the device of a claim for damages.

III. The judge correctly refused to adopt the only testimony of unreasonable delay in loading at Bangor which was opinion testimony on the ultimate issue

given over objection by witnesses who were shown not to be qualified. Appellant, having its own master in charge and present at all times, knowing at the time of sailing that even under normal conditions Voyage 2 would extend far beyond the 120 day period, though not beyond the charter period, which by express definition ran to the end of the voyage, made no protest and did not seek to withdraw and thus waived any previous delay and elected, under familiar principles, to go on under the charter. Upon the arrival in Japan of the LAKE SICAMOUS the conditions of her discharge were the effects of military reverses which were not foreseeable when she sailed, and only after she was permitted by the military situation to discharge was she able to return for redelivery, so that the trial judge correctly found that the loading in Bangor was not shown to have caused any delay in redelivery, such cause being too remote.

IV. The trial judge correctly found that the vessel was discharged as soon as facilities were available in accordance with military priorities and the urgent needs of the armed forces engaged in hostilities in Korea, based on the evidence that sudden and catastrophic military reverses had crowded the ports and overtaxed discharge facilities and that the emergency had made most of the vessel's cargo suddenly unusable and therefore of relatively low importance. Acts and decisions of the military authorities in this situation are the plainest and most characteristic of the sovereign acts which, under our law, excuse delay in the performance of contracts, and the Government

cannot be held for the consequence of such actions. In all the existing facts and circumstances, the charterer exercised reasonable diligence and so met the very standard urged by appellant in this case. Finally, after the delay at Kure the appellant continued to elect to proceed under the charter and expressly indicated that it was still in force.

V. Appellant has inflated its damage claim by exaggerating the market rate of charter hire shown to be effective on the date when appellant contends its vessel should have been redelivered. The rate shown by the record was only \$1,433.68 per day as contrasted with the \$1,791.67 rate claimed by appellant. Moreover, appellant, by shrewdly abandoning its claim of delay in the routing of the vessel, adjusts the date when it contends its vessel should have been redelivered out of a period when the market rate was \$1,164.94 per day and into a period when it was \$1,433.68 per day and thereby increases its total claim from less than \$2,000 to the exaggerated figure claimed in appellant's brief.

ARGUMENT.

I.

THE FINDINGS OF THE COURT BELOW MAY NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

In this appeal, appellants seeks, as it must if it is to prevail, to overturn the findings of the court below which are fully supported by the evidence. Appellant evidently recognizes the rule of *McAllister v. United*

States, 348 U.S. 19, 99 L.ed. 20, 1954 A.M.C. 1999, that findings may not be reversed unless they are "clearly erroneous" but subtly dilutes the rule by the suggestion that this Court weigh the "balance of probabilities" (App. Brief 17). No such weighing of probabilities is allowed by the *McAllister* case. As this Court has said, in *Bjornson v. Alaska S. S. Co.*, 193 F.2d 433, 1952 A.M.C. 477 (9th Cir., 1951), "clearly erroneous"

"... does not mean that the reviewing court shall determine from the record where the weight of the evidence lies. It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence."

Findings are not clearly erroneous simply because a different conclusion might have been reached. *Pacific Portland Cement Co. v. Ford Machinery & Chemical Corp.*, 178 F.2d 541 (9th Cir., 1950). And, of course, where findings are not clearly erroneous the court must accept them notwithstanding that contrary evidence appears which was not adopted by the trial court. *Lerner Stores Corp. v. Lerner*, 162 F.2d 160 (9th Cir., 1947).

Appellant further seeks to suggest a rule of review based upon whether the evidence to be reviewed was given by deposition or in open court. This distinction, which was sometimes observed in the days of unlimited review of facts in admiralty appeals, is simply an expression of that practice of unlimited review, which, in turn, undoubtedly had its roots in

the practice of receiving all testimony in admiralty cases by deposition.¹⁰ The *McAllister* rule makes no provision for a different standard of review of deposition evidence and the application of the old distinction as to depositions would be clearly in violation of the present rule.

II.

THE LAKE SICAMOUS WAS REDELIVERED TO APPELLANT IN PRECISE COMPLIANCE WITH THE PLAIN TERMS OF THE CHARTER PARTY AND APPELLANT HAS FAILED TO COMPLY WITH THE CHARTER PROVISIONS AFFORDING THE EXCLUSIVE MEANS OF INCREASING CHARTER HIRE.

At the time the LAKE SICAMOUS charter was entered into, the outbreak of war in Korea and the intervention of the United Nations forces and their subsequent progress had been the headline news of the preceding weeks. It is admitted that appellant, in making the charter party, contemplated the carriage of munitions of war for the armed forces engaged in hostilities in Korea (Finding IV, R. 59-60; R. 288-289). At this time appellant also knew, as did everyone else, of the occupation of Japan and of the United Nations military intervention in Korea (Findings IV, XI, XIII, R. 59-62). Appellant therefore must have known that its ship would fall under the control of the Supreme Commander, as agent of the United Nations, when she entered the theater of war in general

¹⁰On the earlier practice of taking all testimony by deposition see *Dowling v. Isthmian S.S. Co.*, 184 F.2d 758, 1950 A.M.C. 1876 (3rd Cir.).

and Japanese ports in particular. Moreover, it is a matter of public record, of which this Court may take notice, and which appellant is presumed to know particularly because of its experience in the shipping business, that, under war conditions, inadequate port facilities in the Pacific area seriously delayed ships from returning to the United States, and that even in United States ports the time spent before sailing on the next voyage averaged nearly a month at times during World War II.¹¹

Against this background a charter party was made providing not for the usual fixed period of so many days or "about" so many days, but for a period of "about 120 days . . . or to the termination of the voyage current at termination date". It is obvious that such a charter was made precisely because of the unforeseeable length of a war voyage into the theater of operations. The period of the charter was so expressed in order that the termination of the charter, while not definite, would be capable of being made definite by events, without imposing upon the parties the hopelessly unrealistic considerations of overlap and underlap which, under appellant's view, would bedevil the parties in the uncertainty of war-time operations. The words of the charter party are plain and must be taken according to their plain and literal meaning, without interpretation. *Calderon v. Atlas S. S. Co.*, 170 U.S. 272, 280, 42 L.ed. 1033,

¹¹*Report of the War Shipping Administrator to the President*, 45, (Washington, Government Printing Office, 1946).

1036 (1898); *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 435, 97 L.ed. 1125, 1134, 1953 A.M.C. 952, 959.

The LAKE SICAMOUS was redelivered at the end of her "voyage current at termination date" exactly as specified in the charter. Appellant now speaks of an "overlap voyage"; but there was no overlap voyage, the vessel having been redelivered exactly as provided in the charter party. The Government was entitled to the time needed to complete any voyage in progress at a date 120 days from the delivery date. This was the result reached, even in the absence of such clear language, by Judge Addison Brown in a case repeatedly cited as the foundation stone of the law of overlap. *Straits of Dover S. S. Co., Ltd. v. Munson*, 95 Fed. 690 (S.D. N.Y., 1899), aff'd 100 Fed. 1005 (2nd Cir.).

The same result was reached where a steamer was taken on a six-month charter providing that "Should the steamer be upon a voyage at the expiration of either of the within-named periods, the charterers are to have the use of the steamer at the same rate and conditions . . ." and was sent, over the owner's protest, seventeen days before the expiration of six months, on a voyage which was likely to and did extend the total charter period to eight months. In that case, *Dene Steam Shipping Co. Ltd. v. Bucknall Bros.*, 5 Com. Cas. 372, 376 (Q.B., 1900), the Court stated:

" . . . In my opinion the defendants in entering into the charter party for the voyage from Barcelona were acting within the liberty given them

by the charter party, and by the express terms of the contract they were entitled to complete that voyage on paying for the hire in accordance with the terms of the charter party. I think that it was contemplated by the parties when they entered into this charter party that hire would not only be for a period of about six months, but might be for such an extended period as might be necessary for the completion of a voyage, within the limits specified in clause 2, upon which the steamer might be engaged when the six months expired.”

Because of uncertainty as to the length of time the ship might stay under charter, and to redress any inequities which might arise in the charter rate during a long period, the charter party provided, in Article 29 (R. 102), a mechanism for negotiation of a new rate. Under Article 29, such negotiations had to be requested by a “written demand” for a new rate to be effective not earlier than the date of the “written demand”. It is explicit in Article 29 that such a written demand by the shipowner be *accompanied* by a number of specified data, and that only after the submission of the demand, accompanied by the required data, negotiations were to commence. Failure to agree in negotiations was to be resolved by resort to the “disputes clause” of the charter party. It is to be clearly understood, however, that since no proper demand was ever made by the appellant in this case and there were no negotiations, there is no “disputes clause” issue in this case. It is plain that appellant never made any demand under Article 29,

the letter of January 19, 1951 (Lib. Exh. 6, R. 119) not specifying any date in compliance with Article 29, and it is admitted that appellant failed to submit with the letter of January 19, 1951, or at any other time, the several data required by Article 29 to accompany a "written demand" (Statements VII, VIII, IX and X of Respondent's Request for Admission of Facts and Genuineness of Documents, R. 28, and Libellant's Answers thereto, R. 31).

The plain language of the charter party discloses a charter period which was fully and exactly complied with by the United States. There was no breach by the Government. In order to establish a breach appellant would have the court interpret the plain words of the contract to mean something different than they are. But the words being plain, there is no need of interpretation here and none can be permitted. *Calderson v. Atlas S. S. Co.*, 170 U.S. 272, 42 L.ed. 1033 (1898); *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 435, 97 L.ed. 1125, 1134, 1953 A.M.C. 952, 959.

III.

THE TRIAL JUDGE CORRECTLY FOUND THAT REDELIVERY WAS NOT DELAYED BY ANY INEXCUSABLE ACT OR OMISION AT BANGOR.

A. The only evidence relied on by appellant as to the Bangor loading was inadmissible opinion which the judge correctly refused to adopt.

Appellant urges that the judge was in error in finding that "The redelivery of the LAKE SICAMOUS to libellant was not delayed by any inexcusable

act or omission connected with the loading of her cargo at Bangor.” (R. 60). The evidence upon which appellant relies to refute this finding is inadmissible testimony of Captain Craig admitted over objection and properly not adopted by the trial judge.

Appellant urges in its brief that Captain Craig testified that the loading time at Bangor was unreasonable and further testified to his opinion of a reasonable time. Even if the witness had been qualified to testify to these opinions, it is elementary that the Court would have been free to reject them. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 88 L.ed. 967, 972 (1944). Even more is this so where, as here, the witness was permitted to testify (R. 195-196) to his opinion on a question of reasonableness which was, according to appellant’s own theory of the case, an ultimate issue as to which such testimony was plainly not admissible.¹²

On direct examination, Captain Craig was not shown to be familiar with the ammunition depot at Bangor or the character of operations or conditions prevailing there, and his opinion (R. 195-196) was given over the objection of respondent-appellee. On cross-examination it was shown not only that Captain Craig did not know the cause of any delay, as he repeatedly admitted, but that he had never been in the depot at Bangor, was not familiar with opera-

¹²*United States v. McCreary*, 105 F.2d 297 (9th Cir., 1939); *United States v. Stephens*, 73 F.2d 695 (9th Cir., 1934); *Gordon v. Robinson*, 210 F.2d 192 (3rd Cir., 1954); *Blackshear Mfg. Co. v. Umatilla Fruit Co.*, 48 F.2d 174 (5th Cir., 1931); *Hinds v. Keith*, 57 Fed. 10 (5th Cir., 1893).

tions there and was not familiar with any of the regulations or restrictions governing ammunition handling which might have affected the loading time there (R. 226, 244-245).

Captain Craig's opinion testimony was plainly not proper under the decision of this Court in a case strikingly parallel to this one where it was attempted to introduce testimony on the rate at which work could be done, by experts who were not in fact familiar with the location and actual conditions of the work. *Walton v. Wild Goose Mining & Trading Co.*, 123 Fed. 209 (9th Cir., 1903), cert. denied 194 U.S. 631. As this Court has pointed out in another case, *Kinney's Est. v. Commissioner of Internal Revenue*, 80 F.2d 568 (9th Cir., 1935), the opinion is not entitled to weight where, as here, it is not shown that the witness is basing it upon a full knowledge of the facts. In declining to adopt the opinion of Captain Craig, the trial judge, so far from committing error, took the only possible course.¹³

B. The loading at Bangor and sailing on Voyage 2 were acquiesced in by appellant and any delay was waived by its failure to protest and election to continue.

It is to be remembered that appellant furnished its vessel with its servant and agent, the master, in charge

¹³Evidently, appellant does not rely upon the opinion testimony of Captain Clarke, president of appellant corporation (R. 275), in view of the witness's having given negative answers to counsel's attempts to qualify him (R. 272, 274). In any event, Captain Clarke's disqualification upon the same grounds as Captain Craig's is fully shown (R. 272, 274, 281) and his opinion is entitled to no weight.

and fully manned with officers and crew all of whom were its servants; and that the master, officers and crew were present at all times material to this case and knew all the conditions that appellant now complains of. Certainly the shipowner knew, through its agent, the master (as in its brief, at p. 18, it urges that appellee knew), that the second voyage would be what appellant, in spite of the clear language of the charter party, chooses to call an "overlap voyage". Yet, after what appellant decries here as a breach of charter by delay in loading at Bangor, appellant and the master, who were in full communication, permitted the ship to sail on her second voyage November 10, 1950 without so much as a murmur of protest. So much is shown by the record (Finding VII, R. 61) and appellant does not appear to contend otherwise.

It is elementary contract law that, under a contract of continuing performance such as this, acceptance of acts of performance, failure to protest noncompliance with the contract and continued performance and acceptance of the benefits of the contract operate as a waiver and bar later damage claims.¹⁴ *Swain v. Seamans*, 9 Wall. 254, 19 L.ed. 554 (1870); *Fairbanks Morse & Co. v. Nelson*, 217 Fed. 218 (9th Cir., 1914); *Stennick v. Jones*, 252 Fed. 345 (9th Cir., 1918), cert.

¹⁴The rule is no different in cases where the Government is one of the parties to the contract. *H. E. Crook v. United States*, 59 Ct. Cl. 593 (1924) aff'd 270 U.S. 4; *Dubois Constr. Co. v. United States*, 120 Ct. Cl. 139, 98 F. Supp. 590 (1951); *Murch Bros. Constr. Co. v. United States*, 81 Ct. Cl. 574 (1935); *S.A. Meagher Co. v. United States*, 73 Ct. Cl. 215 (1932).

denied 250 U.S. 664; *Pasquel v. Owen*, 186 F.2d 263 (8th Cir., 1950). As this Court said, in *Fairbanks Morse & Co. v. Nelson, supra*, at 221:

“... it is ... the generally accepted rule that a written contract may be waived in part or in whole, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.”

This general rule of law is applicable to charter parties as well as to other contracts. *The Tregenna*, 121 F.2d 940, 1941 A.M.C. 1282 (2nd Cir.) (Deviation waived by shipper who learns of it while voyage in progress and allows further performance without protest); *The Oregon*, 55 Fed. 666 (6th Cir., 1893) (Voyages slowed by towing other vessels and delay waived by failure to object); *Gilchrist v. Lumbermans Min. Co.*, 65 Fed. 1005 (6th Cir., 1895) (Delay waived). As the court said in *Eastern Transportation Co. v. East Carolina Lumber Co.*, 262 Fed. 195, 200 (E.D. Pa., 1920), a suit on a charter party:

“A contract, even after one party is in default, is either on or off, and although the innocent party has the right of election, and although the right recurs at each succeeding default, it is a right which must be exercised during the life of the contract, and the election cannot be deferred until after the contract is at an end, and the rights of the parties have become otherwise fixed.”

The doctrine of waiver has had particular application to delays in performance such as appellant charges here. *Fairbanks Morse & Co. v. Nelson*, 217 Fed. 218 (9th Cir., 1914); *The Sirius Star*, 196 F.2d 479 (7th Cir., 1952) (Construction of vessel delayed by war conditions; later assistance of other party in completing construction waived performance time); *Hayes Mfg. Corp. v. McCauley*, 140 F.2d 187 (6th Cir., 1944); *Peterson Steels v. Seidman*, 188 F.2d 193 (7th Cir., 1951); *American Surety Co. v. Scott*, 63 F.2d 691 (10th Cir., 1933). The language of the Court in *H. E. Crook v. United States*, 59 Ct. Cl. 593, 597, 598 (1924, *affd* 270 U.S. 4, is particularly applicable:

“... It appears that the plaintiff, notwithstanding the breach of the contract on the part of the Government, went on with the work under the terms of the contract without making any demand upon the defendant . . . The plaintiff by its conduct waived the breach . . .

“The plaintiff had the right, if it had chosen to exercise it, to refuse to go on with the work, but when it elected to proceed with the work and took no steps to protect itself against any extra expense which it might incur by reason of delay of the Government, and proceeded with the work under the contract, the parties stood in the same relation to each other when the contract was entered into . . .

“... Having waived the breach, it cannot now be heard to ask for a change in the contract which will impose upon one of the parties the payment of an additional sum for the completion of the work.”

Appellant in this case knew, when it entered into the charter party, that carriage of munitions into the war area was contemplated (Finding IV, R. 59) and, as an experienced ship operator, was plainly aware of the delays and difficulties which might arise in the theater of war as the voyage progressed. Through the master of the LAKE SICAMOUS and otherwise, appellant was thoroughly acquainted with all that took place before the ship commenced her second voyage November 10, 1950. Yet, in view of the facts it now complains of and the indefiniteness of a voyage in the war area, it not only made no effort to withdraw its vessel as it might have done¹⁵ but uttered not even the slightest word of protest.

If any offer had in fact been made to appellant to charter its ship at a higher rate than it was receiving, it is certain that appellant would have exercised any right which it thought it had in the circumstances to protest the second voyage or withdraw its ship, but no such action was taken. It is plain that appellant enjoyed the charter and desired to go on under it and, as late as the day the ship left Kure to return to Seattle and redelivery, libelant expressly indicated, in a letter to the Government Contracting Officer, its understanding that the vessel was continuing under her charter (Lib. Exh. 6, R. 119). This expressed

¹⁵*Luckenbach v. Pierson*, 229 Fed. 130, 132 (2nd Cir., 1915). See *Britain Steamship Co. v. Munson Steamship Line*, 31 F.2d 530, 531, 1929 A.M.C. 442, 444 (2nd Cir.), cert. denied 280 U.S. 574; *The Rygja*, 161 Fed. 107, 108 (2nd Cir., 1908). Cf. *The Gazelle*, 128 U.S. 474, 32 L.ed. 496 (1888); *The Laurent Meeus*, 43 F. Supp. 807, 1942 A.M.C. 484 (S.D. Cal.) aff'd 133 F.2d 552, 1943 A.M.C. 415 (9th Cir.) cert. denied 318 U.S. 781.

understanding is in sharp conflict with the view that appellant may now recover a *quantum meruit*. Appellant cannot sharpen its pencil at the end of the voyage and the end of the charter and only then make its election according as events have shown where its greater advantage would have lain.

C. The loading at Bangor was not shown to have caused any delay in redelivery.

Even apart from the other considerations which compelled its finding regarding the loading at Bangor, the Court could not have found otherwise in view of the later developments on the voyage and in the absence of proof of any causal connection between the loading at Bangor and "delay" in redelivery, and of the amount of "delay" in redelivery so caused.

It is elementary that a party claiming damages for breach of contract must not only prove a breach, but also prove that the damage complained of was the natural and proximate consequence of that breach. *Louisiana Mutual Ins. Co. v. Tweed*, 7 Wall. 44, 52, 19 L.ed. 65, 67 (1869); *United States v. Chicago B. & Q. R. Co.*, 82 F.2d 131, 136 (8th Cir., 1936) cert. denied 298 U.S. 689 ("directly and in natural sequence"); *Driscoll v. United States*, 34 Ct. Cl. 508, 526 (1899), cert. denied 298 U.S. 689; *Myerle v. United States*, 33 Ct. Cl. 1, 27 (1897). As the court said in *Osage Oil & Refining Co. v. Chandler*, 287 Fed. 848, 852 (2nd Cir., 1923):

"... The party complaining must show, not only only that he has suffered the loss, but also that it would not have been incurred, but for the

wrongful act of his adversary; and the amount of the loss is as much to be proved by the plaintiff as the fact of the loss. . . .”

Where, as in this case, a new cause has intervened sufficient to explain the length of the second voyage so that it cannot be said that the alleged breach at Bangor caused any loss or how much loss it caused, the necessary showing of causation has not been made and there can be no recovery. As the Supreme Court said in *Louisiana Mutual Ins. Co. v. Tweed*, 7 Wall. 44, 52, 19 L.ed. 65, 67 (1869):

“One of the most valuable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. *If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.*” (Emphasis supplied).

In the present case, where the time consumed in the Orient was due to adverse “fortunes of war,”¹⁶ it is impossible to say that the ship would have returned any earlier had she sailed earlier from Bangor, or to speculate upon what date she might have departed Kure had she arrived on a different date than she did. It was presumably because of these very imponderables that the charter was written as it was, with its period not to expire upon a given date but to run until the end of the voyage. At all events, the appel-

¹⁶See *United States v. Caltex (Philippines)*, 344 U.S. 149, 155, 97 L.ed. 157, 163 (1952).

lant, having decided, after the termination of the charter, that it might be to its advantage to claim that the ship was tardily laden at Bangor, did not—for it could not—show that it had suffered any loss because of the Bangor loading. The trial judge made the only finding he could, since the alleged delay at Bangor was too remote a cause, as a matter of law, under the holding of the Supreme Court in *Memphis & Charleston R. Co. v. Reeves*, 10 Wall. 176, 19 L.ed. 909 (1870), a case which affords a striking parallel to the present one.¹⁷

IV.

THE DISCHARGE PERIOD AT KURE WAS DUE TO THE ACTS OF SOVEREIGN NATIONS ENGAGED IN WARLIKE OPERATIONS FOR THE CONSEQUENCES OF WHICH THE UNITED STATES MAY NOT BE HELD LIABLE.

- A.** The trial judge correctly found that the vessel was discharged as soon as facilities were available in accordance with military priorities.

Appellant next attacks the Court's finding, supported by overwhelming evidence, that the LAKE SICAMOUS was discharged at Kure "as soon as dis-

¹⁷The case cited was a suit for loss of goods in the hands of a common carrier as the result of a flood where it was contended that the carrier was liable because of its improper delay in commencing the carriage, upon the ground that but for the delay the goods would not have been at the scene of the flood. The Supreme Court held that the cause of loss must be considered to be the flood, the delay being too remote. See also *Continental Grain Co. v. Armour Fertilizer Works*, 22 F. Supp. 49, 1938 A.M.C. 414 (S.D. N.Y.) (unreasonable delay in discharging under voyage charter followed by delay in sailing caused by intervening labor dispute); *Otis Elevator Co. v. Standard Constr. Co.*, 92 F. Supp. 603 (D. Minn., 1950); *Woodyard v. Barnett*, 335 Mich. 352, 56 N.W. 2d 214 (1953).

charging facilities were available, in accordance with military priorities then in effect and the urgent need of the armed forces engaged in hostilities in Korea.” Appellant would reduce the serious world crisis, which determined the time of discharge of the LAKE SICAMOUS, into a simple matter of improvidently “ordering too many ships into the port” (App. Brief 26) and “lack of storage capacity ashore” (App. Brief 29) by plucking from the record bits of testimony as to the *effects* of the crisis and presenting them to this Court as the *causes*.

The record abounds with testimony to support the trial judge’s finding as to delay at Kure. As Colonel Sanderson, who was over port operations at Kobe, and at Kure so far as American ships had the use of that port, testified concerning the Chinese offensive (R. 299-300) which began in November 1950 (R. 300):

“... Their offensive was great and they swept down through. At the Port of Inchon the tonnage-handling capacities were reduced tremendously, and Pusan bore the brunt of all cargo going into our allied forces in Korea.

“This necessitated what we called the operation ‘Snap Back,’ in other words, to get such equipment out of Korea and into Japan to be used at any other time when a second offensive would be initiated by the allied forces.

“In conjunction and parallel with this operation many ships at sea destined for Korea were again diverted to ports in Japan and Okinawa.”

The sudden and rapid retreat of United Nations forces which Colonel Sanderson describes, in addition

to reducing the available ports and causing congestion in those that remained, caused a serious change in the ammunition requirements. Artillery ammunition, which, as the colonel stated (R. 329), is primarily useful when you are advancing, was now superfluous. And airplane rockets of the type which formed the part of the cargo which was discharged early at Moji, and which were particularly effective against troop concentrations (R. 324) such as the United Nations forces were now faced with, were in great demand by the Air Force which, "using those rockets became the Army's artillery." (R. 325).

Appellant lays great stress upon lack of storage ashore as the cause of delay and, although it is not clear how this matter affected the real questions in this case, it may be well to refer to the record and correct the impression appellant would give as to storage. The testimony as to storage facilities in the record appears to be discussion of an incidental problem. On cross-examination by appellant's proctor, Colonel Sanderson made it clear that the delay was not a matter of storage space, but of movement of the cargo across the single pier, out of the pier area on the single railroad track, and through populous places where concentration of more than a certain small amount of explosives in a given area at any one time was not allowed (R. 317-318).

Upon a reading of the testimony of the Government witnesses it is clear that the cargo of the LAKE SICAMOUS was discharged in accordance with a system of priorities based, realistically, first upon the

need for the type of cargo, and second upon the length of time the ship had been in the theater. Under this system, high priority cargo was often discharged first and the ship then sent out to anchor to await later discharge of low priority cargo, just as was done with appellant's vessel. To all of this the witnesses, Colonel Sanderson (R. 304-306), Major Scales (R. 336-338) and Lieutenant Colonel Blust (R. 347-348) testified fully. And all of these officers testified that the wait of the LAKE SICAMOUS for discharge was by no means unusual, the waiting periods in Kure, and all other ports as well, being very commonly from 60 to 80 days (R. 306, 310, 338, 349).

Against this evidence appellant poses only the unsupported suggestion that its vessel was in some way discriminated against because she was not immediately discharged without regard for the needs of the military forces, and the bland suggestion, ingenuous in the light of the common experience of shipping in war, that a waiting period of 30 days would be "*ipso facto* unreasonable." Appellant, presumably willing to recognize the force of priorities for the prosecution of war, if applied by a local board or committee safe at home and far from the sound of the guns, places itself in the absurd position of refusing to recognize the ultimate priorities imposed by the tide of battle and enforced by the military commander in the field.

Finally, it is to be noted that even after the discharge at Kure, of which appellant now so bitterly complains, on January 19, 1951, the day the LAKE SICAMOUS sailed for home, appellant's agents, J. H.

Winchester & Co., wrote the Government Contracting Officer (Lib. Exh. 6, R. 119) a letter stating their intention to seek negotiation of a higher charter rate at a later date and indicating very plainly their understanding that the LAKE SICAMOUS was still operating under the existing charter. Such action is plainly inconsistent with the present attempt to seek a *quantum meruit*. Appellant's suggestion (Brief 38) that M.S.T.S. might have requested earlier discharge is naive. M.S.T.S. had no reason to make such a suggestion in the light of the charter terms and no justification for doing so in view of the military situation prevailing. The testimony of Colonel Sanderson on this point (R. 328) is not that he would have been able to do anything about such a request but simply as to how it might have reached him. The truly significant fact is not that M.S.T.S. made no request but that appellant itself made none, and appellant's master made none, although present and acquainted with the circumstances.

B. The United States may not be held liable for circumstances caused by military operations of sovereign nations.

It has long been settled, on the highest authority, that the act of a military commander in delaying a ship in a military port during war is a sovereign act for which damages can not be recovered against the United States. *United States v. Diekelman*, 92 U.S. 520, 23 L.ed. 742 (1876); *J. A. Zachariassen & Co. v. United States*, 94 Ct. Cl. 315, 1941 A.M.C. 1058, cert. denied 315 U.S. 815; *J. A. Zachariassen & Co. et al. v. United States*, Ct. Cl., F.Supp.,

1956 A.M.C. 1409, 1414. Cf. *Graham v. United States*, 2 Ct. Cl. 327 (1886). And nothing is better settled in the American law of contracts, maritime or otherwise, than the rule that prevention or interference by such sovereign acts excuses contract performance. *Texas Co. v. Hogarth Shipping Co.*, 256 U.S. 619, 631, 65 L.ed. 1123, 1131 (1921) ("compliance with the charter party was made impossible by an act of state."); *L. N. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694, 1950 A.M.C. 80 (2nd Cir., 1949) cert. denied 339 U.S. 914 (compliance with directions of Maritime Administration as to loading). This rule does not depend upon the existence of a "restraint of princes" exception in the charter party.¹⁸

¹⁸Appellant's brief would suggest that the holding of the court below was placed upon the narrow ground of "restraint of princes", an exception of more importance in litigation arising in other countries where the general rule relied on by the judge below and by appellee here may not prevail. In any event the "restraint of princes" exception affords an independent ground of decision here. Under the exception, only compliance with the orders of those in authority is required, and no actual force need be applied or even be capable of being applied to the vessel. *British & Foreign Marine Ins. Co. v. Samuel Sanday & Co.* [1916] 1 A.C. 650, 669 (H.L.) ("restraint . . . imposed by political or executive acts . . . is not the less a restraint . . . because the master submits without opposition and without the presence of either actual or threatened force"); *Furness v. Redericktiebolaget Banco*, [1917] 2 K.B. 873 (master's refusal to violate decree which would subject him to penalties on return to home state); *Rickards v. Forestal Land, Timber and Railways Co.*, [1942] A.C. 50 H.L.) (acts of German masters in carrying out instructions to scuttle if unable to return home at outbreak of war); *Miller v. Law Accident Ins. Co.*, [1903] 1 K.B. 712 (refusal to land cargo contrary to orders of local department of agriculture). See *Battat v. Home Ins. Co.*, 56 F. Supp. 967, 1946 A.M.C. 1249 (N.D. Cal., 1944) (Norwegian ship turned back to Honolulu following Pearl

It is settled that the general rule is applicable where the performance of the Government itself is interfered with by sovereign act. The rule has never been more clearly stated than by the Supreme Court in *Horowitz v. United States*, 267 U.S. 458, 461, 69 L.ed. 736, 737 (1925), a suit for damages for the Government's failure to ship goods at the time promised because of a railroad embargo imposed by itself through the same department which made the contract. The Court said:

“It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming v. United States*, 1 Ct. Cl. 190, 191; *Jones v. United States*, 1 Ct. Cl. 383, 384; *Wilson v. United States*, 11 Ct. Cl. 513, 520. In the *Jones* case, 1 Ct. Cl. 383, the Court said: ‘The two characters which the Government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for the acts done in the other. Whatever acts the

Harbor in compliance with orders from British Royal Navy which had operational control of her).

The “restraint of princes” exception is applicable to the present case particularly under *Rodocanachi v. Elliott*, L.R. 9 C.P. 518 (Exchequer 1874), where delivery of cargo was interfered with by military activities, and *Adamson & Mail v. 4,300 Tons Pyrites Ore*, 137 Fed. 998 (E.D. S.C., 1905) where refusal of port authorities to let the ship berth in turn was held to be an “intervention of the constituted authorities”. Under the decision of this Court in *The Laurent Meeus*, 133 F.2d 552, 1943 A.M.C. 415 (9th Cir.) cert. denied 318 U.S. 781, even the prior approval of the government to a charter does not make its subsequent interference any less a restraint.

Government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons . . . In this Court, the United States appears simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.' "

The rule of the *Horowitz* case has been repeatedly and consistently applied before and since by the lower Courts. It governs the case of actual restraint of the contractor from performance by the military authorities, *Wilson's* case, 11 Ct. Cl. 513 (1875), as well as cases arising out of the wartime system of priorities and allocations. *Otis Williams & Co. v. United States*, 120 Ct. Cl. 249 (1951). *Alamo Construction Co. v. United States*, 116 Ct. Cl. 221, 88 F. Supp. 883 (1950). And it is a significant feature that a contractor knows, as here, that his contract is a war contract and that he may therefore encounter difficulties because of priorities or allocations. *Pearson, Dickerson, Inc. v. United States*, 115 Ct. Cl. 236 (1950). The priorities applied to the present case were not the result of estimates and computations at long range but were priorities in the most real and urgent sense, imposed by a military power, not only in military command of United Nations forces present, but also exercising

complete political authority over the territory as the agent of the occupying sovereigns.

Appellant demands evidence that the priorities at Kure applied to other ships than its own; but the plain testimony of the port officers on this point was that priorities applied to all ships (R. 304-306, 336-338, 347-348). And surely it is no objection, as appellant seems to suggest, that the priorities changed from time to time to reflect current needs! Any question whether the acts of the military authorities in the port were sovereign acts is certainly put to rest by *United States v. Dieckelman*, 92 Wall. 520, 23 L.ed. 742 (1876), and *J. A. Zachariassen & Co. v. United States*, 94 Ct. Cl. 315, 1941 A.M.C. 1058, cert. denied 315 U.S. 815, where the acts of the port authorities were in fact directed at one vessel only.

As the Court said in the recent case of *Derecktor v. United States*, 129 Ct. Cl. 103, 113, 128 F. Supp. 136, 141, 1954 A.M.C. 1485, 1493, where the Government was held not liable for damages for the Maritime Administration's refusal to deliver a ship under a contract of sale until long after the contract date, because of a request from the State Department based upon the possible effect of the sale upon foreign relations:

“The State Department's action was a sovereign act. It was, in effect, an embargo. It seems to have applied to only one ship. But we have no doubt that the same policy could have been applied to any other ship or owner if there had been probable cause to believe that it presented the same problem.”

The Court went on to say:

“... If there is any field in which the hands of the Government should not be tied, in which it should feel free to meet and solve problems without fear of being charged with breach of contract, that field must be peculiarly the field of international relations.”

Surely the same observations may be applied with even more force to the conduct of war. There is no more characteristically sovereign pursuit, and it is undoubtedly out of the requirements of war that the broadest powers and immunities of the sovereign with respect to private interests have sprung.¹⁹

The acts of the executive, so long as they are done out of consideration of the general public good, are held to be sovereign acts excusing government performance even when they apply in fact only to the single contract in question; *Wilson's Case*, 11 Ct. Cl. 513 (1875); *Froemming Bros. of Tex. v. United States*, 108 Ct. Cl. 193, 70 F. Supp. 126 (1947) (Government diverted materials from contractor's use to uses of greater military urgency upon occurrence of Pearl Harbor); *Standard Accident Ins. Co. v. United States*, 103 Ct. Cl. 607, 59 F. Supp. 407 (1947) cert. denied 326 U.S. 729; *Derecktor v. United States*, *supra*; or to a group of similar contracts, with the

¹⁹Cf. *The Case of the King's Prerogative in Saltpetre*, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (1606); *The Magdalen College Case*, 1 Roll. Rep. 151, 81 Eng. Rep. 394 (1615); *United States v. Pacific R. R. Co.*, 120 U.S. 227, 30 L.ed. 634 (1887); *United States v. Caltex (Philippines)*, 344 U.S. 149, 97 L.ed. 157 (1952).

contracts used as a means of enforcing the restraint. *Barnes v. United States*, 123 Ct. Cl. 101, 105 F. Supp. 817 (1952); *E. & F. Constr. Co. v. United States*, 116 Ct. Cl. 512, 89 F. Supp. 541 (1950); *Clemmer Constr. Co. v. United States*, 108 Ct. Cl. 718, 71 F. Supp. 917 (1947). The matter is well summarized in the words of this Court in *Reconstruction Finance Corp. v. Chromium Products Corp.*, 202 F.2d 664, 667 (9th Cir., 1953) cert. denied 346 U.S. 819:

“Such a Presidential restriction [with the operation of a particular Government contract so as to divert workers to ‘critically needed’ production] is as much a governmental operation as a Presidential order that soldiers should be removed from one field of battle to another.”

The Court is not to look behind the decision of the military authorities in a matter of this kind. See *Hirabayashi v. United States*, 320 U.S. 81, 93, 87 L.ed. 1774, 1782 (1943).

Appellant relies heavily upon the standard laid down in *Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co.*, 77 Fed. 919, (8th Cir., 1896), a case where, contrary to the position of appellant here, the charterer was held excused of delay because of a strike in the port, and the standard laid down by dictum was that the vessel should be discharged in a reasonable time in view of all the existing facts and circumstances, ordinary and extraordinary, legitimately bearing upon the question at the time. Any “delay” to the LAKE SICAMOUS was not only contemplated but clearly proper, not only

upon the grounds set forth in the authorities cited above, but under the rule laid down in the *Empire Transportation Co.* case, which libellant has put forward as a measure of its own case. In *J. A. Zachariassen & Co. et al. v. United States*, Ct. Cl., F. Supp., 1956 A.M.C. 1409, 1414, the court stated, concerning delays caused by exercise of discretion of military authorities in ports, that "While such delays are unfortunate, we believe in the circumstances of these cases, that they are inevitable in time of war . . ." and concluded that such delays were not unreasonable. The burden appellant assumes has not been borne.

V.

APPELLANT'S CLAIM OF DAMAGES IS GROSSLY INFLATED.

Appellant contends that the vessel should have been redelivered January 2, 1951 and claims at the unsupported rate of \$1,791.67 per diem thereafter. Appellant's witness on market rates testified (R. 171-172) that the rate, on December 31, 1950, was \$4.00 per ton, or \$1,433.68 per diem, and on January 10, 1951, \$5.00 per ton, or \$1,792 per diem. He gave no testimony as to January 2 or any date between December 31 and January 10. So it appears that the only rate shown to be effective on January 2, 1951 was \$1,433.68, at which rate appellant's entire claim would be at the rate of only \$308.68 per diem instead of the \$666.67 per diem now claimed.

Moreover, appellant, by an ingenious maneuver, characteristic of the opportunism of its entire case,

abandoned its claim for delay allegedly caused by the vessel's having been given a devious routing, (R. 197-202, 261-267) and thereby dropped about 7 days (R. 200-202) from its claim. Had it not abandoned this branch of the claim, its hypothetical redelivery date would be December 26, 1950. The highest market rate testified to by appellant's witness for this period was \$3.25 per ton, or \$1,164.94 per diem. Appellant's entire claim of damages figured at the resulting rate of \$39.94 per diem amounts to less than \$2,000!

Damages in the admiralty are given or withheld in the sound discretion of the Court. *The Palmyra*, 12 Wheat. 1, 6 L.ed. 531 (1827); *The Marianna Flora*, 11 Wheat. 1, 6 L.ed. 405 (1826). Based on gross exaggeration of damages alone, the Court would be justified in denying recovery in this case. Cf. *The Springbok*, 5 Wall. 1, 18 L.ed. 480 (1867).

CONCLUSION.

Appellant entered into a charter party with appellee under wartime conditions of which both parties were aware, it being contemplated by both parties that appellant's vessel, under the charter, would carry cargoes of munitions to the theater of war. The parties, so far from having overlooked the possibility of delay because of conditions well-known to exist at foreign war bases, had provided in the charter party that the period should run until the end of the voyage current 120 days from delivery, and the ship was re-

delivered in strict compliance with that provision. This is borne out by the acquiescence of appellant at every stage of the voyage, through its agent, the master, who was present and in charge and aware of conditions at all times.

The parties had provided a mechanism for revision of charter rates, which would operate to relieve libelant should the charter period extend so long as to make the stated rate inadequate. Libelant has utterly failed to seek a revision of charter hire in accordance with the remedy provided for in the charter party and, having ignored that remedy, cannot equitably be allowed to elect the law suit which that remedy was designed to prevent.

The redelivery of the vessel was made as promptly as was consistent with the period required for discharging by reason of supervening military considerations and sovereign acts of the United Nations and its component sovereigns in the conduct of war, behind which the Court is not free to look. All this is well shown by the uncontradicted evidence of military officers in authority in the ports involved. For the results of these sovereign acts, the United States cannot be held liable.

Finally, libelant has set up for itself a standard of proof which it has failed to meet. Libelant concedes that it has the burden of proving a lack of reasonable diligence in view of all the existing facts and circumstances, ordinary and extraordinary. Such circumstances include, of course, the military conditions and other circumstances of which there was abundant evi-

dence in this case. The libelant has signally failed to bear its burden of proof with respect to any period at issue in this case.

It is respectfully submitted that the decree should be affirmed.

Dated, August 20, 1956.

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**United States Court of Appeals
For the Ninth Circuit**

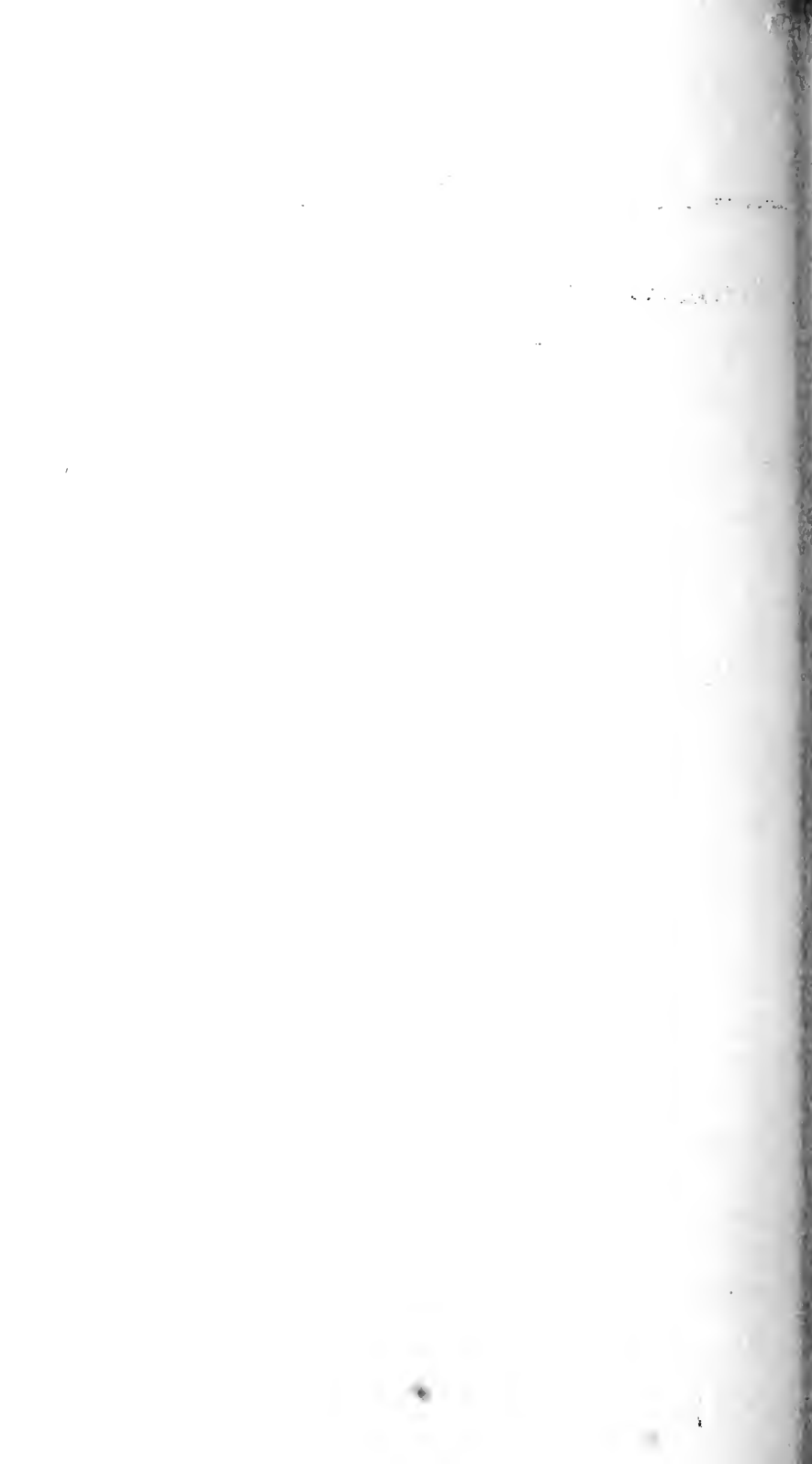
WESTERN CANADA STEAMSHIP Co., LTD., a corporation,
Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION**

**REPLY BRIEF OF APPELLANT
WESTERN CANADA STEAMSHIP CO., LTD.**

BOGLE, BOGLE & GATES
STANLEY B. LONG
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Seattle 4, Washington.



No. 15004

United States Court of Appeals
For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
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REPLY BRIEF OF APPELLANT
WESTERN CANADA STEAMSHIP CO., LTD.

BOGLE, BOGLE & GATES
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United States Court of Appeals

For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD., a corporation,	<i>Appellant,</i>	} No. 15004
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT WESTERN CANADA STEAMSHIP CO., LTD.

I.

INTRODUCTION

Notwithstanding appellee's vigorous attempts to create a contrary impression, this is a simple case involving only the most elementary principle of charter party law, *i.e.*, that a time charterer is liable to the owner for any delay in redelivery resulting from the charterer's lack of due diligence in the prosecution of an overlap voyage.

The occupation of Japan has nothing to do with this case. At no time did appellee even purport to be acting in its capacity as an occupying power in connection with this charter party.

Likewise, the United Nations has nothing to do with this case. Appellant dealt exclusively with the United

States Navy (M.S.T.S.) and the United States Army. As Colonel Sanderson testified, all American supplies were forwarded to Japan and Korea by M.S.T.S. ships (Tr. 322); British forces were supplied by British ships (Tr. 323). It is apparent that appellee had its own ports and discharge facilities in Japan and the British had their own (Tr. 323). Kure itself was a British port, made available to appellee so long as British ships were given first call on port facilities (Tr. 308, 323). Colonel Sanderson, appellee's own witness, testified that: "We had no control over any other ships in that harbor except those carrying POL, packaged POL, and ammunition. We had no control." (Tr. 323) Under these circumstances, appellee certainly cannot hide its own shortcomings in the performance of its contract behind the facade of the United Nations.

Appellee's argumentative statement of the questions presented (Br. 24) assumes the very facts disputed on this appeal, and thus does not fairly present the questions involved herein to the Court. Appellee's statement of the case (Br. 4-12) is also argumentative, to say the least. Rather than shift the focus of this argument to a morass of petty bickering over such matters, appellant will quote in detail herein the testimony relevant to each issue.

II.

ARGUMENT

A. The Findings Herein Complained Of Do Not Fall Within the “Clearly Erroneous” Rule and Hence May Be Set Aside if This Court Differs with the Trial Court on the Weight of the Evidence.

Contrary to appellee’s assertions, and to the implications of appellant’s opening brief, this Court is not bound by the “clearly erroneous” rule with respect to the findings herein complained of, for two reasons. First, the findings complained of are conclusions of ultimate fact (bordering upon conclusions of law), made as secondary inferences from the entire evidence, which was substantially undisputed; and second, the findings complained of are not based upon “demeanor testimony” in the court below, but upon depositions, pre-trial discovery and other documentary evidence, so that the credibility of witnesses is not in issue.

1. Findings of fact in the nature of conclusions of ultimate fact are not subject to the “clearly erroneous” rule.

All the Supreme Court held in *McAllister v. United States*, 348 U.S. 19 (1954), in the final analysis, was that:

“No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure.”

What is the scope of review under Rule 52 (a)? As this Court has repeatedly held:

“When a finding is essentially one dealing with

the *effect* of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions.” (Italics added)

Stevenot v. Nordberg, 210 F.(2d) 615, 619 (C.A. 9 1954); *Brown v. Cowden Livestock Company*, 187 F.(2d) 1015, 1018 (C.A. 9 1951); *Plomb Tool Co. v. Sanger*, 193 F.(2d) 260, 264 (C.A. 9 1951); *Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation*, 178 F.(2d) 541, 548 (C.A. 9 1950); *Smith v. Royal Insurance Co.*, 125 F.(2d) 222, 224 (C.A. 9 1942).

In the case at bar the findings complained of are findings dealing essentially with the *effect* of certain transactions or events shown by undisputed evidence, *i.e.*, that the redelivery of the Vessel to appellant “was not delayed by any inexcusable act or omission connected with the loading of her cargo at Bangor,” that the Vessel was discharged at Kure “as soon as discharging facilities were available, in accordance with military priorities then in effect and the urgent needs of the Armed Forces engaged in hostilities in Korea,” that appellee “exercised reasonable diligence in all of the circumstances in its performance of the charter party,” that the delays at Bangor and Kure were caused by sovereign acts and thus excused under the “restraint of princes” exception in the charter party, and that appellant “failed to perform the terms and conditions of Article 29 of the charter party by failing to make any demand for negotiations for a revision of the rate of

charter hire under the terms and conditions of Article 29.”

No witness testified to any of these ultimate conclusions. They are the conclusions of the trial judge from the undisputed evidence. This Court is free to draw its own conclusions from that evidence free of the restrictions of the “clearly erroneous” rule.

2. Findings of fact based upon “non-demeanor” evidence are not subject to the “clearly erroneous” rule.

In *Equitable Life Insurance Society of the United States v. Irelan*, 123 F.(2d) 462, 464 (C.A. 9 1941), this Court stated the rule as follows:

“Since all testimony bearing on the circumstances antecedent to and surrounding her death was by deposition, the finding of accidental death, while it is justly entitled to consideration, has not the weight we would otherwise be obliged to concede to it. This court is in as good a position as the trial court was to appraise the evidence and we have the burden of doing that. Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following §723(c), was intended to accord with the decisions of the scope of the review in Federal Equity Practice; and, as is well known, in the federal courts where the testimony in equity or admiralty cases is by deposition the reviewing court gives slight weight to the findings.”

See, also, *Orvis v. Higgins*, 180 F.(2d) 537 (C.A. 2 1950), certiorari denied 340 U.S. 810 (1950), and *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), on this point. The rule is clear that under Rule 52(a) the appellate court is free to disregard

findings of the trial court based upon evidence not involving the judgment of the trial court as to the credibility of the witnesses.

Here, substantially all of the evidence relating to the findings complained of consists of depositions, written exhibits, and answers to interrogatories. Accordingly, this Court need not attach undue weight to such findings, since the trial court's conclusions could not have been based upon any estimate of the credibility of the witnesses from their demeanor, manner or appearance. As a matter of fact, having the entire record before it in printed form, this Court is in a *better* position than was the trial court to draw ultimate conclusions.

B. The Vessel Was Not Redelivered to Appellant in Compliance with the Plain Terms of the Charter.

The charter party simply provides that:

“This Charter shall be for a period of about 120 days from the time of delivery of the Vessel or to the termination of the voyage current at termination date.”

An option for a 120-day extension in favor of appellee was deleted from the charter party form (Tr. 98-99; Ex. 1).

There is nothing magical in the phrase “or to the termination of the voyage current at termination date.” Normally, under an “about” charter the charterer must either overlap or underlap, whichever will result in redelivery closest to the end of the flat period specified. POOR ON CHARTERPARTIES AND OCEAN BILLS OF LADING 12 (4th ed. 1954). This being the case, it is apparent that the only effect of the clause “or to the end of the

voyage current at termination date" was to give appellee an absolute right to overlap, whether or not an underlap would result in redelivery closer to the flat period.

On the other hand, nowhere does the charter party even purport to relieve the charterer from the consequences of its own lack of due diligence in the prosecution of an overlap voyage, and it is this lack of due diligence that gives rise to appellant's right of recovery in this action. *The Rygja*, 161 Fed. 106 (C.A. 2 1908).

Under the circumstances then, having failed to exercise due diligence in the prosecution of the overlap voyage, appellee failed to perform its obligations under the charter party and appellant is entitled to recover its damages occasioned by that failure.

Appellee attempts to derive some solace from the fact that at the time the charter party was entered into both parties contemplated the carriage of munitions to Japan, and appellant knew of the occupation of Japan and the outbreak of the Korean War. However, these facts militate against appellee, not appellant, for two reasons.

First, it is settled law that the "restraint of princes" exception applies only to future restraints, not existing restraints. *Rotterdamsche Lloyd v. Goshō Company, Inc.*, 298 Fed. 443 (C.A. 9 1924), certiorari denied 266 U.S. 621 (1924). Second, where a party knows of a condition which might interfere with his performance of a contract and fails to specify the occurrence of the condition as an excuse for his non-performance, he is not excused from performance by the occurrence of the

condition. In other words, it was up to the appellee, which had the duty to load and discharge the Vessel with reasonable diligence, to provide for congestion as an exception in the "mutual exceptions" clause if it desired its non-performance to be excused thereby. *Inter-Coast S.S. Co. v. Seaboard Transp. Co.*, 291 Fed. 13 (C.A. 1 1923); see *W. K. Niver Coal Co. v. Cheronea S.S. Co.*, 142 Fed. 402, 414 (C.A. 1 1905), certiorari denied 201 U.S. 647 (1906).

Thus, to the extent that the then existing occupation of Japan or United Nations intervention in Korea operated as a "restraint of princes," or to the extent that appellee should have contemplated the future congestion in Japanese ports, they cannot be relied upon to excuse the delay in Japan that subsequently ensued. That appellee should have anticipated the congestion is admitted at page 18 of appellee's brief. Yet, appellee failed to provide against such otherwise inexcusable delays in the charter party, which was its own standard form of contract.

C. All of the Evidence in the Record, Without Contradiction, Clearly Shows That the Redelivery of the Vessel Was Unreasonably Delayed by Reason of Appellee's Failure to Load the Vessel with Reasonable Diligence or Within a Reasonable Time Under the Circumstances at Bangor.

Having in mind the broad scope of appellate review that is permissible in this case, appellant submits the following uncontradicted evidence as requiring a finding in its favor regarding the delay at Bangor:

- (1) Captain Craig, the master of the Vessel, who is

no longer employed by appellant and thus not subject to bias or prejudice (Tr. 175), who has had years of experience at sea (Tr. 175-178), who was the only witness who was present during the loading at Bangor, who observed the facilities available for loading and who observed the actual loading (Tr. 196), testified that all the Vessel's derricks and winches were available for loading, that the Vessel was loaded in berth, and that cargo was brought alongside in railroad cars and thence up to ship's tackle by civilian longshoremen employed by the M.S.T.S. (Tr. 196). He further testified as follows:

“Q. Based upon your experience as an officer and master of ocean-going vessels, . . . was that vessel loaded within a reasonable time at Bangor, . . . having in mind the cargo loaded, and the amounts thereof?

* * *

A. I don't think so.” (Tr. 195)

“ * * *

A. In my opinion twelve days would be a reasonable time for loading that cargo.” (Tr. 196)

(2) The Vessel was not loaded twenty-four hours a day, seven days a week, as was the custom in west coast ports, and appellee has failed to show circumstances excusing the delay. In this regard Captain Craig testified unequivocally with respect to both Canadian and American west coast ports, and with respect to both general and bulk cargo, as follows:

“A. * * * It is the custom there to have continuous loading. * * * 24 hours a day. * * *

Q. What is the custom with respect to a 7-day week. A. Well, they work week ends also.

* * *

Q. Was this custom followed by the United States in loading the vessel at Bangor? . . .

A. No. * * * ” (Tr. 190)

Instead, the Vessel was worked 24 hours a day for only three days, then left idle for the week-end, then worked only one or two shifts a day for five days and left idle for another week-end, then worked only one shift a day for five days and left idle for a third week-end, then worked only one shift a day for four and a half days until loading was completed (Tr. 190-194).

(3) Captain Clarke, likewise an experienced ship's officer and steamship operator, testified as follows:

“Q. * * * How much time . . . would it reasonably take to load approximately 9,000 tons of ammunition aboard a vessel such as the S.S. Lake Sicamous under normal port conditions with adequate loading facilities?

* * *

A. 12 to 14 days.” (Tr. 274-275)

(4) The Vessel was actually loaded at Bangor in a total working time of only nine days, nineteen hours and thirty minutes (Tr. 190-195).

(5) The vessel actually discharged the same cargo in two different ports of discharge in a total working time of less than ten days (less than three days at Moji (Tr. 202-204) and less than seven days at Kure (Tr. 209)).

(6) On the first voyage the Vessel was loaded at Mukilteo in a total elapsed time of 14 days, 8 hours and 30 minutes (Tr. 183).

(7) On the first voyage the Vessel discharged at

Okinawa in a total elapsed time of 9 days, 15 hours and 40 minutes (Tr. 185).

(8) At Mukilteo, Okinawa and Kure the Vessel was worked 24 hours a day, 7 days a week, with only minor exceptions (Tr. 183-184, 185-186, 209-210), whereas at Bangor she was worked 24 hours a day for only three days, then left idle for a week-end, then worked one or two shifts a day for five days and left idle for another week-end, then worked only one shift a day for five days and left idle a third week-end, then worked only one shift a day until loading was completed (Tr. 190-194).

(9) Reverses in Korea could not have affected loading at Bangor, since loading at Bangor was completed on November 10, 1950 (Tr. 194), while the Chinese did not enter the war in Korea until late in November or early December, 1950 (Tr. 300).

(10) There is no evidence that the hazard of handling ammunition, or the "mass detonation" problem, was in any way related to the delay at Bangor. In fact, to the contrary, since it affirmatively appears that the delay was caused by the failure of appellee to work the Vessel more than one or two shifts a day and not at all on week-ends, rather than merely a continuous but slow loading procedure, the inescapable inference is that the handling hazard or mass detonation problem did not contribute to the delay.

There is no evidence contrary to the foregoing.

There is no evidence from which any excuse for the delay can be inferred.

The sole and inevitable conclusion to be drawn is that the redelivery of the Vessel to appellant was un-

reasonably delayed by at least 11 days, 17 hours and 15 minutes by reason of appellee's failure to load the Vessel with reasonable diligence or within a reasonable time under the circumstances at Bangor.

D. The Delay at Bangor Was Not Waived by Appellant.

Appellee, apparently recognizing the fact of an unreasonable delay at Bangor, now claims a waiver. This claim has no legal merit, comes too late and is not supported by the record or the findings.

A waiver is a voluntary relinquishment of a known right. Here the vessel left Bangor on November 10, 1950, approximately one month *prior to* the expiration of the 120-day flat period specified in the charter party. At that time, since appellee had an absolute right to overlap, and since a voyage within the world-wide trading limits specified in the charter party could still have been accomplished even within the 120-day flat period, appellant had no legal right to withdraw the Vessel from the charter. Since appellant thus had no legal right which could be waived, appellee's authorities regarding waiver are inapplicable.

In addition, it is elementary that waiver is an affirmative defense which must be pleaded and proved. Appellee did not plead a waiver, although it had two opportunities to do so (Answer, Tr. 9-10; Amended Answer, Tr. 43-54). For this reason neither appellant nor appellee offered any evidence regarding protests or the lack thereof. The findings of fact, prepared by appellee, originally contained a statement in findings of fact VI and VII that the Vessel was loaded at Bangor and sailed therefrom "without objection from Libellant."

Upon appellant's request, since this statement was not material to any issue in the case at that point, the court below interlineated the words "evidence disclosing," making the statement in each finding read "without *evidence disclosing* objection from Libellant" (Italics added).

Now, not having presented evidence to meet an issue never tendered by appellee in its pleadings or proof, appellant is met with a contention on appeal that appellee has proved a waiver by the failure of appellant to disprove a waiver!

This negative approach to the problem of meeting the burden of proof becomes even more ridiculous when it is recalled that this occurred a month prior to the expiration of the original 120-day charter term, and that appellee had an absolute right to overlap under the charter party.

E. The Delay at Bangor Is Recoverable.

Appellee now contends that the delay at Bangor is not shown to have caused any delay in redelivery because the delay at Kure, for which appellant contends appellee is likewise liable, was an intervening cause of the ultimate delay in redelivery. In other words, appellee, by introducing the proximate cause concept of tort law into a contract case, attempts to expand the protection of its alleged sovereign acts at Kure to excuse prior delay not connected with those alleged sovereign acts. To put it another way, appellee asserts that it has made mistakes in sufficient numbers to avoid responsibility for any of them.

The simple answer to the argument is that appellee is liable for any delay on the overlap voyage caused by its failure to prosecute the voyage with reasonable diligence. *The Rygja*, 161 Fed. 106 (C.A. 2 1908). It is the delay itself that injures appellant. Thus, such cases as *Memphis and Charleston Railway Co. v. Reeves*, 10 Wall. 176 (1870), relied upon by appellee at page 30 of its brief, are inapplicable. There the question was whether the delay was the proximate cause of the loss of goods. Here the question is whether any portion of the delay in redelivery was the natural result of the delay at Bangor.

The natural and proximate result of the delay at Bangor was that the Vessel arrived in Japan later than she otherwise would have, was discharged later than she otherwise would have been, and returned to Seattle and was redelivered later than she otherwise would have been. In the face of such simple arithmetic, appellee would have the Court speculate that had she not been delayed *at all* at Bangor, she might have been delayed *longer* at Kure. Appellant might with equal validity speculate that had there been no delay at all at Bangor, the Vessel would have arrived early enough to be discharged without any delay at all in Japan. In either event, there is no basis for such speculation. The natural result of the unreasonable delay at Bangor was an equivalent delay in redelivery at the end of the voyage. This is all that it required under the cases cited by appellee itself at page 28 of its brief.

F. The Redelivery of the Vessel to Appellant Was Unreasonably Delayed by Reason of Appellee's Failure to Provide a Berth and Discharging Facilities for and Discharge the Vessel with Reasonable Diligence or Within a Reasonable Time Under the Circumstances at Kure.

Here again there is no disputed testimony or other evidence, and this Court is free to draw its own conclusions of ultimate fact. Appellant relies upon the following facts as requiring a conclusion in its favor on this point:

1. The congestion at Kure was voluntarily created by appellee, and thus cannot excuse the delay. It is undisputed that the only ships in Kure in December and January were M.S.T.S. ships (Tr. 290-293, 322, 352), and it is apparent that the Vessel would have been given a berth and discharged immediately upon her arrival at Kure but for that congestion. As Colonel Sanderson testified:

“Q. Can you state what period was common for the delay of vessels in Kure?

A. Well, I would say that it could not be less than a month, *so many came in at one time.*” (Tr. 310) (*Italics added*)

2. The congestion and lack of storage space, and particularly the oversupply of 105 and 155 howitzer ammunition, in Japan existed *prior to* the entry of the Chinese into the Korean War. The testimony on this point is as follows:

Colonel Sanderson:

“Towards the end of November, 1950, *due to the success of our campaign and the catch-up of ton-*

nage moving into the theatre, many ships instead of coming into Japan to discharge their cargoes, were diverted at sea to proceed to Korea because we had opened up ports in Korea to take cargo direct instead of reshipping it out of Japan to the port of Pusan." (Tr. 299-300) (Italics added)

(Comment: In other words, anticipating rapid success after the Inchon landing in September, appellee shipped ammunition into Japan so fast that the tonnage caught up to and exceeded available storage space. Consequently, ships were diverted to Korean ports for discharge.)

"A. * * * Since the latter part of *July* and *August* and of *September* we had built up a *tremendous* amount of reserve of certain types of ammunition in Korea, and also we had built up a *tremendous* amount of ordnance ammunition in Japan that we had reached in many cases, which has been brought out by previous testimony in cases that are now a matter of record and have no classification, of certain cargoes which were in abundance, certain types of ordnance and ammunition were in abundance, and other cargoes were very scarce." (Tr. 301) (Italics added)

"Q. *Will you describe the ammunition that had the low priority and of which you state that you had an overabundance?*

A. Small arms was down on the list, 30 caliber, 45 caliber, 50 caliber. *On artillery pieces it was the 105's, the 155's* which were not of extreme high priority, but I would say were the middle low priority." (Tr. 301-302) (Italics added)

(Comment: In other words, as early as July, August and September, 1950, long before the Vessel was even

loaded for the second voyage, Japanese storage areas became overloaded with "a tremendous amount of" 105 and 155-mm. howitzer shells and available storage space was exhausted.)

"A. The Port of Kure, *due to the overflow of ammunition entering into Japan - - -*

Q. That is, during the latter part of November, December and January?

A. Right, sir, *before December. In November, with the great tonnages of ammunition that was moving into Japan and on into the ordnance ammunition depots, which were limited in number, the ammunition depots, that such a big backlog of cargo had accumulated in the only available depots, that steps had to be taken to look further into the old Japanese depots, ones which we had not used since we occupied the country. There were three that I know of: Kure, Miseru, and one in the north of Japan, of which I do not know the name.*" (Tr. 307) (Italics added)

Lt. Colonel Blust:

"Also, *there was considerable congestion at the depots that had been previously established, both rail and at the ports that had been used. So, we opened up an operation at Kure.*" (Tr. 346) (Italics added)

(Comment: In other words, existing Japanese depots were congested *prior to* the November survey and consequent opening up of Kure as a port and storage depot.)

"*There were many, many ships having nothing but 155's, and there was a lot in storage.*" (Tr. 347-348) (Italics added)

“Q. But do you remember quite clearly that during the period December, 1950, there were lots of 105 and 155 artillery ammunition around?

A. Well, that is my recollection, yes, sir. *We were always heavy on that. That seemed to be the biggest thing coming over.*” (Tr. 351-352) (Italics added)

(Comment: In other words, Japanese depots were overloaded with 105 and 155-mm. howitzer ammunition prior to the Korean reverses. Nevertheless appellee continued to ship large additional quantities of the same into Japan. In fact, the Vessel itself was originally destined for Yokohama.)

3. The Vessel and other ships were ordered to Kure for discharge in early December when Kure was not yet ready to receive 105 and 155-mm. ammunition for storage. The evidence on this point is as follows:

Colonel Sanderson:

“Lieutenant Colonel Blust was the officer I recommended to make the original survey of the Port of Kure, and I believe this was shortly before Thanksgiving or around Thanksgiving, to look into the Port of Kure as an ammunition-handling port.

“Colonel Blust went down there and came back with a report. He proceeded to headquarters in Yokohama and made his report there with ordnance, of course, and the recommendation with the British forces there how much could be handled. *Nothing had been done prior to Colonel Blust's trip with the rehabilitation of the Japanese ammunition depots. If the depots had been opened up and had all their equipment in operable condition, discharge naturally could have been expedited, be-*

cause you could handle more, but because they had not been, the Port of Kure for quite some time could not be counted upon as a full-fledged ammunition port due to the hinterland facilities not having been rehabilitated in five years, since 1945 or prior thereto.

Q. Was that a port for vessels with cargo similar to that shown in the manifest, Libellant's Exhibit 20, that were sent from Yokohama and Moji for discharge?

A. Yes, sir, vessels were sent there to have their cargo placed into the ammunition depots." (Tr. 310-311) (Italics added)

(Comment: In other words, when first opened in early December Kure had only a limited storage capacity at best. Nevertheless, " . . . vessels were sent there to have their cargo placed into the ammunition depots.")

"A. The Ordnance, that is their responsibility, made a report of the depots which would have to be rehabilitated before any great amount of cargo or ammunition could move into those depots.

Q. And that report was made some time during the month of November, 1950?

A. I think it was in November, because they were given a short time to make this survey. As to the exact dates and the period covered, I cannot say.

Q. *And at that time other depot facilities in and around Kure were taxed beyond their capacity, I take it?*

A. *Kure had not been opened up for ammunition until this survey was completed.*

"Q. *Were those the only facilities for storage of*

ammunition that were to be available at Kure, then?

A. *At Kure, yes, sir.*'' (Tr. 316) (Italics added)

Major Scales:

“Q. Do you know if the Japanese ammunition dumps at Eta Jima and Kure were rehabilitated and ready for ammunition storage on December 1st?

A. On December 1st?

Q. Yes, by December 1st.

A. By what standards do you mean? Do you mean by the standards we would normally accept within the Ordnance Corps for the movement of ammunition and the acceptance of ammunition, or by what?

Q. Were they ready to take and did they commence storing ammunition in them?

A. They took *some* ammunition. They received ammunition, yes, sir.

Q. Were they still in the process of doing further rehabilitation?

A. They were rehabilitating ammunition depots within Japan until 1953, sir, yes.

Q. *I want to be a little more specific particularly with respect to the facilities right there in and around Kure. Do you know whether they were still in the process of rehabilitating those Japanese depots in December, 1950?*

A. *I would say yes, sir, such things as rail lines, revetments and things like that that had been demolished under the occupation policy.*

Q. As they were rehabilitated they would be ready for more storage?

A. Their total storage capacity would be greater,

yes, sir. Their daily capacity would be greater, yes, sir.” (Tr. 340-341) (*Italics added*)

Captain Craig:

“Q. Did you receive any further advice from anyone in the Harbor Master’s office as to why you were not discharged?

A. Well, there was an assistant there, a Master Sergeant, I believe he was, and I had a talk with him one day in the office there, and he—*he did tell me that they were making a new ammunition dump and that we wouldn’t be discharged until that was ready to receive the ammunition.*” (Tr. 211) (*Italics added*)

4. Despite repeated inquiries by Captain Craig, appellee made no effort to discharge the Vessel until word was passed along that her charter had expired, notwithstanding the fact that special arrangements could have been made for immediate discharge. The testimony on this point is as follows:

Captain Craig:

“Q. . . . going back to the period in which you lay at anchor in the stream awaiting a berth at Kure for discharge, you say you were first advised by Captain Robertson that you would be unloaded by Christmas. Thereafter did you inquire, make any inquiries of the Harbor Master for orders for discharge?

A. I went ashore almost every day to the Harbor Master’s office, and every time I was in his office I asked him when he was going to start discharging us.” (Tr. 210-211)

“Q. . . . when you were finally discharged were you advised why you were being discharged?

A. . . . prior to discharge there was a civilian, I believe he was the United States Ammunition Inspector for that area, came aboard, and it was from him that I first received information that they were going to start discharging me, *and he came aboard, I think it was about January 10th, and told me that he had received . . . orders from the Logistics Command in Yokohama to get the ship discharged as quickly as possible and get her back to Seattle as the charter had expired.*" (Tr. 212)

"Q. Was there an M.S.T.S. representative there?

A. Not stationed at Kure, no.

Q. Did any M.S.T.S. representative contact you at Kure?

A. Not until late in January when I got word to start discharge, and then the representative came down from Kobe.

Q. And did he give you any instructions at that time?

A. He gave me instructions that after discharge I was to go back to Seattle." (Tr. 215-216)

Colonel Sanderson:

"Q. So, as a general proposition the port authorities who controlled the discharge of the vessels had no information whatsoever as to whether or not charters had expired or were about to expire or what terms vessels were chartered for?

"A. There were two ways we found out or we would be informed, and that would be through the M.S.T.S. representative who would be in Yokohama, who would advise the transportation section of the Japanese Logistical Command of certain conditions or whether the master of the vessel,

when he made his port of call, advised the port authorities, who were responsible for his discharge, that his charter was to run out a certain date and he wanted his ship discharged, and so forth. That would be the only two ways we would know about charters running out." (Tr. 328-329)

5. The Vessel could have been fully discharged promptly at Moji, but instead was sent to Kure and consequently delayed. On this point Captain Craig testified that Moji was one of the principal ports for the southern island of Japan and had facilities for handling many ships. Ample native longshoremen, who worked under the supervision of army personnel, were available, as were facilities for the discharge of cargo over-side into barges. At that time the Moji harbor was not congested. An M.S.T.S. representative was available at Moji, and Captain Craig was ashore quite often to talk to him and thus had ample opportunities to observe available facilities at Moji from both ship and shore (Tr. 205-207). Based upon this observation, Captain Craig testified as follows:

"Q. Based upon your observation of the facilities available . . . , could your entire cargo have been unloaded at Moji?

A. It certainly could, according to the facilities I observed." (Tr. 205-206)

"A. There was untold wharfage space, and if they wanted there were plenty of barges in the stream, and they used the stream often in commercial discharge, so there was both facilities out in the stream and alongside for discharging the vessel.

“A. From my observation there was plenty of labor available.” (Tr. 207)

Instead, the M.S.T.S. instructed the Vessel to proceed to Kure, a port just newly opened up, with known inadequate storage capacity ashore, for discharge, together with so many other M.S.T.S. ships that congestion was bound to cause delay.

6. Even had the Vessel been discharged in order of her arrival at Kure, her discharge would have commenced only seven, rather than 30, days after arrival, and she would have been discharged within 14 days after arrival. The testimony on this point is as follows:

Captain Craig:

“Q. Now, how many berths were available for unloading vessels at Kure?

A. To my recollection, there were four berths.

Q. And they — would they accommodate four ships?

A. I believe they would.

Q. Did they also discharge vessels into barges?

A. They did, yes.

Q. What stevedoring facilities were available?

A. They had native longshoremen doing the actual discharging.

Q. And who supervised them?

A. Under the supervision of army personnel.

Q. Do you have an opinion, based upon your observation, your actual observation while in port at Kure as to how long it would have taken to discharge your vessel if it had been discharged in its regular turn?

* * *

A. Yes, I have an opinion.

Q. What is that opinion?

A. *In my opinion the vessel should have been discharged within seven days from the time of commencing discharge.*

Q. And do you have an opinion as to how long you would have waited for a berth, if you had been given a berth in turn, in your regular turn?

“A. In my recollection there were two ships in the harbor that went into the wharf after I arrived, and on that basis *I would say that I may have had to wait six or seven days and then gone alongside to discharge.*” (Tr. 214-215) (Italics added)

7. Other M.S.T.S. ships were discharged at Kure before the Vessel was, even though their charters all contained an option in favor of appellee for a 120-day extension, while that of the Vessel did not (Tr. 213-214, 290-293).

8. Basically, the situation at Kure, and in Japan generally, was parallel in all respects to the situation presented in *W. K. Niver Coal Co. v. Cheronea S.S. Co.*, 142 Fed. 402 (C.A. 1 1905), certiorari denied 201 U.S. 647 (1906), where the court said:

“However, even if there had been an insufficiency of wharves or of barges or lighters, that was not a matter beyond control, but a condition to which the consignee had contributed. It had four large coal steamers involved in these appeals, voluntarily bunched together in the port at Boston; and the case of the steamship LAKE MICHIGAN, disposed of at our last term, shows another even larger steamer for which it was responsible, in port at the same time. * * * Thus, while the Roath was delayed, more than her entire cargo was discharged

into lighters from other steamers chartered or controlled by the W. K. Niver Coal Company. Its own vessels, or vessels under its control, were given facilities which, if concentrated on the Roath, would have discharged her seasonably.

“The same course of reasoning is to be applied to all the steamers involved in the appeals before us. Each of them had her own rights as against the W. K. Niver Coal Company. They were not under a joint contract, but each was under a separate contract; so that each was entitled to assert her rights independently of the others, although the consignee had so involved itself by its several charters, or by charters on its account, that it was unable to do its duty by any of them. *A condition of affairs brought about by a contractor on the one part does not relieve him from his obligation to each of the contracting parties on the other part, acting severally, because the condition resulted in embarrassing all of them at the same time. To consent to any other rule would permit a contractor to relieve himself of his contracts in proportion to the number of parties he might involve in his own embarrassment by virtue of his own separate voluntary acts.*” (Italics added)

G. The Korean Reverses Were Not the Sole Proximate Cause of the Delay at Kure.

The evidence stated above clearly shows that the congestion and lack of storage capacity in Japan existed *prior to* the Korean reverses in December. This being the case, the “restraint of princes” exception could not excuse the delay at Kure. Here again the situation is parallel in all respects to that presented in *Hellenic Transport S.S. Co. v. Archibald McNeil & Sons Co.*,

Inc., 273 Fed. 290 (D.C. Md. 1921), where the court laid down the rule with respect to the "mutual exceptions" clause in a charter party, as follows:

"In order that the contingencies specified in them shall constitute a good defense, performance must have been thereby rendered in a practical sense impossible, illegal or dangerous (Citations omitted). *It is not sufficient that the happening of one of them adds materially to the difficulties and embarrassment of the parties relying on it, if nevertheless it is still possible to perform* (Citations omitted).

"It is true that the restraint may not have been directed against the ship or the goods. It may have had other objects as, for example, the prevention of ingress or egress to or from a besieged or blockaded place, and in that sense may have been indirect. (Citations omitted). *It must, however, have been the proximate, as distinguished from the remote cause.* (Citations omitted). *If by itself it could not have prevented performance, it will not excuse merely because, in combination with non-excepted causes, it did so.* (Citations omitted).

" * * *

"It is no light matter to weaken the binding force of mercantile contract, and the burden is heavily on him who asks that it be done. After the charterer, and others, who wished to ship coal abroad, had hired more ships than could be loaded with reasonable promptness, somebody was bound to lose heavily. (Citations omitted). Such miscalculations are always costly. They are less likely to be repeated if those who make them find themselves unable to shift the burden to other shoulders." (Italics added)

See, also, *United States v. Cargo of Linseed*, 20 F.(2d) 199 (D.C. N.Y. 1927), affirmed 28 F.(2d) 1021 (C.A. 2 1928). At the most, the Korean reverses merely added to the already existing congestion in Japanese ports.

H. Appellee Has No Immunity Regarding Sovereign Action Independent of the Charter Party.

In quoting from cases such as *Horowitz v. United States*, 267 U.S. 458 (1925), appellee overlooks the peculiar nature of the redelivery obligation in a charter party. Even an Act of God is no excuse for failure to redeliver when due, unless expressly excepted in the charter party. *Schoonmaker-Conners Co., Inc. v. Lambert Transp. Co.*, 269 Fed. 583 (C.A. 2 1920). Therefore appellee has no immunity as a contractor regarding any delay resulting from sovereign action except that immunity contracted for under the "restraint of princes" exception in the charter party. And, in that context:

"Restraint of princes means the operation of the sovereign power by an exercise of *vis major* in its sovereign capacity, controlling and directing for the time, the dominion or authority of the owner over the ship." *Baker Castor Oil Co. v. Insurance Co. of North America*, 60 F.Supp. 32 (D.C. N.Y. 1944), affirmed 157 F.(2d) 3 (C.A. 2 1946), certiorari denied 329 U.S. 800 (1947).

Here, all that happened at Kure was that appellee as charterer, for various reasons of its own, chose not to discharge the Vessel upon her arrival, but instead discharged others of its ships first. This voluntary omission simply does not qualify as sovereign action, much less a "restraint of princes" in the technical sense.

I. This Action Is Not Barred by Failure of Appellant to Demand a Revision of the Charter Rate of Hire Under Article 29 of the Charter Party.

This matter has been covered in appellant's opening brief (pgs. 43-47). However, appellee's treatment of the question deserves some comment.

Appellee's Amended Answer complains only of appellant's alleged failure to deliver a *demand* for revision (Article XIV, Amended Answer; Tr. 50). No issue was raised in the pleading stage or at the trial regarding any failure of appellant to accompany the demand with certain cost and other data, which would have been irrelevant in any event, under the circumstances. Appellee thought so little of this issue that it did not even offer in evidence the Answers of appellant to appellee's Request for Admission of Facts mentioned at pages 10, 11 and 21 of appellee's brief. Nevertheless, now, at the appellate level, appellee weakly attempts to *create* an arguable issue by raising a point not presented by the pleadings or proof, which issue is immaterial in any event.

Appellant submits that under the circumstances this Court should summarily dispose of this issue in favor of appellant on the grounds stated in appellant's opening brief.

J. Appellant Is Entitled to Recover Its Damages Herein.

Appellee now argues that its success in the trial court in resisting a portion of appellant's original claim is an "ingenious maneuver" on appellant's part, and evidence of appellant's "opportunism" (Br. 41-42). An

absurd claim! It lies ill in appellee's mouth now to complain of its own success in the court below.

Appellant seeks damages under the Suits in Admiralty Act, 46 U.S.C.A. §741, *et seq.*, which provides that:

“Such suits shall proceed and shall be heard and determined according to the principles of law . . . obtaining in like cases between private parties.”

Here, had a private charterer so delayed the loading of the Vessel and so burdened its discharge and storage facilities as to cause further delay from the congestion of its own ships at the port of discharge, the owner could recover its damages for the delay.

The evidence is clear that except for the delays at Bangor and Kure the Vessel would have been redelivered on or about January 2, 1951, and could have been rechartered immediately at \$4.75 to \$5.00 per dead-weight ton (Tr. 159-160). This being the case, appellant is entitled to damages for the total unreasonable delay of 41 days, 15 hours and 35 minutes in the sum of not less than \$24,174.97 and not more than \$27,766.35, together with interest and costs.

III.

CONCLUSION

For the foregoing reasons, and those specified in appellant's opening brief, appellant urges that this Court should reverse the decree of the court below and enter a decree awarding appellant recovery of its damages, interest and costs in the court below from appellee.

Respectfully submitted,

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